TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 54.

HAMMOND PACKING COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF ARKANSAS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

FILED APRIL 1, 1907.

(20,649.)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907.

No. 271.

HAMMOND PACKING COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF ARKANSAS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

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1 *Copy of Transcript from Pulaski Circuit Court.*

Pleas Before Hon. E. W. Winfield, Judge of the Pulaski Circuit Court, Second Division, in the Case of

1691.

STATE OF ARKANSAS *ex Rel.* ROBERT L. ROGERS, Attorney General, Plaintiff,

vs.

HAMMOND PACKING COMPANY, Defendant.

2 In Pulaski Circuit Court.

STATE OF ARKANSAS *ex Rel.* ROBERT L. ROGERS, Attorney General, Plaintiff,

vs.

HAMMOND PACKING COMPANY, Defendant.

Complaint at Law.

Complaint.

Comes the plaintiff, the State of Arkansas, by and at the relation of its Attorney General, Robert L. Rogers, and for cause of action against the defendant, the Hammond Packing Company, states:—

First.

First cause of action.

That said defendant is a foreign corporation, organized under the laws of the State of Illinois, for the purpose, amongst others, of purchasing and selling live stock of all kinds, of slaughtering same, of manufacturing their various products into commercial commodities, of selling the same, of owning and operating refrigerator and other cars and of transacting any business incidental to any of the aforesaid objects.

That on the 26th, 27th, 28th, 29th, 30th, and 31st days of March, 1905, the said defendant was transacting and conducting in the county of Pulaski and State of Arkansas a portion of its sales business for its aforesaid products and commodities, and had and maintained in said county and State an agent, an office and a place for the transaction of its business, and an agent for the service of process within the State.

Defendant entered into a pool or trust &c.

That on the 23rd day of January, 1905, and on the 25th day of March, 1905, and on the 26th, 27th, 28th, 29th, 30th and 31st days of March, 1905, the defendant had created, entered into and become, and was then, a member of and a party to a pool, trust, agreement, combination, confederation and understanding,

3 with certain other corporations, partnerships, individuals, persons and associations of persons, engaged in lines of busi-

ness similar in most respects and objects to that conducted by the said defendant, amongst whom were Swift and Company, the Cudahy Packing Company, the Armour Packing Company, Nelson Morris and Company and Armour and Company, to regulate and fix the selling price of certain articles of manufacture, merchandise, commodity and convenience, to-wit: the commercial products of slaughtered live stock, and to maintain such price when so regulated and fixed, contrary to the form of the statute in such cases made and provided, and in violation thereof.

That by an Act of the General Assembly of the State of Arkansas, entitled An Act providing for the punishment of pools, trusts and conspiracies to control prices, etc., approved January 23rd, 1905, it is provided in Section One thereof, that "Any corporation, organized under the laws of this or any other State or country and transacting or conducting any kind of business in this State * * * who are now, or shall hereafter create, enter into, become a member of, or a party to, any pool, trust, agreement, combination, confederation or understanding, whether the same is made in this State or elsewhere, with any other corporation, partnership, individual or any other person or association of persons, to regulate or fix, either in this State or elsewhere, the price of any article of manufacture * * * merchandise, commodity, convenience * * * or any article or thing whatsoever * * * or to maintain such price when so regulated or fixed * * * shall be deemed guilty of a conspiracy to defraud and be subject to the penalties as provided by this act."

Act of Jan. 23, 1905.

Sec. 1.

That by said Act it is also provided in Section Two thereof, that "Any * * * corporation or company * * * violating any of the provisions of this act, shall forfeit not less than Two Hundred nor more than Five Thousand Dollars for every such offense, and each 4 day such * * * corporation * * * shall continue to do so shall be a separate offense, the penalty in such case to be recovered by an action in the name of the State at the relation of the Attorney General etc. * * *.

Sec. 2.

That by said act it is further provided in Section Three thereof, that "Any corporation * * * created or organized by or under the laws of any other State or country, which shall violate any provisions of the preceding sections of this act shall thereby forfeit its right and privilege thereafter to do any business in this State, and upon proper proof being made thereof in any court of competent jurisdiction in this State, its right and privilege to do business in this State shall be declared forfeited."

Sec. 3.

Wherefore plaintiff alleges that said defendant, by transacting and conducting in this State the business of selling the products, articles and commodities aforementioned, in this State, while a member of and a party to such pool, trust, combination, and understanding as aforesaid: and by being a member of and a party to such pool, trust,

combination and understanding as aforesaid, while transacting such business in this State as aforesaid, violated the provisions of said Act and thereby forfeited its right and privilege thereafter to do business in this State; and that, by committing said prohibited acts upon the 26th, 27th, 28th, 29th, 30th and 31st days of March 1905, the said defendant became liable to the plaintiff in the sum of Thirty Thousand Dollars, and an action accrued to the plaintiffs to recover said sum according to the provisions of said Act.

Prayer. The premises considered, plaintiff prays judgment that the right and privilege of said defendant to do business in this State be declared forfeited, and that plaintiff have and recover of said defendant the sum of Thirty Thousand Dollars, and all her costs in this suit expended, together with all the expenses of the Attorney General in prosecuting same, as provided in said act, and for all other and proper relief.

5 And the plaintiff, for further cause of action against the defendant, states:

Second.

Second cause of action. That said defendant is a foreign corporation, organized under the laws of the States of Illinois, for the purpose, amongst others, of purchasing and selling live stock of all kinds.

That on the 26th, 27th, 28th, 29th, 30th and 31st, days of March, 1905, the defendant was transacting and conducting business in the county of Pulaski and State of Arkansas, and had and maintained in said county and State, an agent, an office and a place for the transaction of its business, and an agent for the service of process within the State.

Defendant entered into a pool or trust &c. That on the 23rd day of January, 1905, and on the 25th day of March, 1905, and on the 26th, 27th, 28th, 29th, 30th, and 31st, days of March, 1905, the defendant had created and entered into and became, and was then a member of and a party to a pool, trust, agreement, combination, confederation and understanding with other corporations, partnerships, individuals, persons and associations of persons, engaged in lines of business similar in most respects and objects to that conducted by said defendant, amongst whom were Swift and Company, the Cudahy Packing Company, the Armour Packing Company, Nelson Morris and Company and Armour and Company, to regulate and fix the price by them to be paid for certain articles, commodities and things, to-wit: cattle, hogs, sheep and other kinds of live stock and food animals, and to maintain such price when so fixed, contrary to the form of the statute in such cases made and provided, and more fully set out in the first section of this complaint, which in said respects is hereby adopted, said Act being entitled "An Act providing for the punishment of pools, trusts and conspiracies to control prices etc." and having been approved January 23rd, 1905.

Wherefore the plaintiff alleges that said defendant, b
6 transacting and conducting in this State its business, as afore
said, while a member of and a party to such pool, trust, com
bination and understanding as above set out; and by being a mem
ber of and a party to such pool, trust, combination and understandin
as aforesaid, while transacting and conducting such business in thi
State as aforesaid violated the provisions of the said Act and thereb
forfeited its right and privilege thereafter to do business in this State
and that, by committing said prohibited acts upon the 26th, 27th
28th, 29th, 30th and 31st days of March, 1905, the said defendan
became liable to the plaintiff in the sum of Thirty Thousand Dollar
and an action accrued to the plaintiff to recover said sum, accordin
to the provisions of said act.

The premises considered, plaintiff prays judgment that the righ
and privilege of said defendant to do business in thi
Prayer. State be declared forfeited, and that the plaintiff hav
and recover of the defendant the sum of Thirty Thou
sand Dollars, and all her costs in this suit expended, together wit
all expenses of the Attorney General in prosecuting same, and fo
all other proper relief.

(Signed) ROBT. L. ROGERS,
Relator, Attorney General of Arkansas.

LEWIS RHOTON,
Prosecuting Attorney.
MURPHY & LEWIS,
W. L. & D. D. TERRY, AND
CAMPBELL & STEVENSON,
Of Counsel for Plaintiff.

(Endorsed:) Filed and summons issued Aug. 11th, 1905. P. I
Carnes, Clerk. By R. B. Brodie, D. C.

7 AUGUST 11TH, 1905.

Summons issued August 11th, 1905, returnable within twent
days from date, and returned September 8th, 1905, duly served o
A. C. Moore, Auditor of State for the Hammond Packing Company
Fees, 60c.

C. C. KAVANAUGH, *Sheriff*,
By BARNEY STIEL,
Deputy Sheriff.

SEPTEMBER 22ND, 1906.

Summons issued September 22nd, 1905, returnable within twent
days from date, and returned September 25th, 1905, duly served o
F. L. Royston, Agent for the Hammond Packing Company.
Fees, 60c.

C. C. KAVANAUGH, *Sheriff.*

8

SEPTEMBER 30TH, 1905.

1691.

STATE OF ARKANSAS *ex Rel.* —— ——, Plaintiff,
vs.
HAMMOND PACKING CO., Defendant.

Comes the plaintiff by W. L. Terry her attorney, and by leave of the Court files herein an amendment to her complaint.

9

In the Pulaski Circuit Court.

STATE OF ARKANSAS *ex Rel.* ROBERT L. ROGERS, Attorney General, Plaintiff,
vs.
HAMMOND PACKING COMPANY, Defendant.

Amendment to Complaint at Law.

Amendment to complaint.

Comes the plaintiff, the State of Arkansas, by and at the relation of its Attorney General, Robert L. Rogers, and for further cause of action against the defendant, the Hammond Packing Company, and by way of amendment and addition to its original complaint herein filed, says:

Third.

Third cause of action.

That said defendant is a foreign corporation, organized under the laws of the State of Illinois, for the purpose amongst others, of purchasing and selling live stock of all kinds, of slaughtering the same, manufacturing the various products thereof into commercial commodities and selling same, and of owning and operating refrigerator and other cars, and of transacting any business incidental to any of the aforesaid objects.

That on the 26th, 27th, 28th, 29th, 30th and 31st, days of March, 1905, the said defendant was transacting and conducting in the State of Arkansas and county of Pulaski, a portion of its business aforesaid and had and maintained in said county and State an agent, and office, and a place for the transaction of its business, and an agent for the service of process within the State.

Defendant engaged in a monopoly.

That on the 26th, 27th, 28th, 29th, 30th and 31st days of March, 1905, aforesaid and on the 23rd day of January, 1905, and on the 25th day of March, 1905, and on each of said dates, while so transacting and conducting business in the State and County aforesaid, the said defendant was engaged in a monopoly within the intent and meaning of the Act of the General Assembly of the State of Arkansas, approved January 23rd, 1905, num-
10 bered one and entitled "An Act providing for the punishment of Pools, Trusts and Conspiracies to control prices etc." contrary to the form of said statute and in violation thereof.

How the monopoly was created.

That said monopoly was effected and created by means of a union, combination consolidation and affiliation of capital, credit, property, assets, trade, customs, skill, acts and other valuable things and possessions, by and between the said defendant and other persons, firms, corporations and associations of persons, firms and corporations, to-wit: The Omaha Packing Company, the Anglo-American Provision Company, the Continental Packing Company, the St. Louis Dressed Beef & Provision Company, the Fowler Packing Association, the United Dressed Beef Company, the G. H. Hammond Company, the Ruddy Brothers Company, the Hutchinson Packing Company, the National Packing Company, the National Car Line Company, the Provision Dealer's Dispatch, the Anglo-American Refrigerator Company, the Kansas City Refrigerator Car Company, the St. Louis Dressed Beef Refrigerator Car Company, the Hammond Refrigerator Line, J. O. Armour, P. A. Valentine, Arthur Meeker, Thomas J. Conners, L. F. Swift, Edward F. Swift, Lawrence A. Catron, Edward Tilden, Edward Morris, Ira N. Morris and Thomas E. Wilson, under the corporate names and styles following, to-wit: The National Packing Company, The National Car Line Company and The Provision Dealer's Dispatch.

Its effect on prices of commodities.

Whereby the price of certain articles of manufacture, merchandise, commodity, convenience and other valuable articles and things—that is to say, the price of slaughtered live stock and food animals and the various commercial products and commodities manufactured therefrom, and the price for the transportation of same and other articles in refrigerator cars and otherwise, was regulated and fixed and maintained when so regulated and fixed.

Limited the quantity thereof.

and whereby the amount and quantity of the aforesaid articles of manufacture, commodity, merchandise and convenience and other valuable articles and things were fixed and limited.

11 *and whereby* the aforesaid ends of regulating and fixing and maintaining when so regulated and fixed, the price of the articles and things of value aforesaid and of fixing and limiting the quantity of such articles and things was sought to be accomplished,

and whereby the aforesaid ends were promoted and sought to be executed and carried out,

and whereby the aforesaid ends were reasonably calculated to be produced.

Wherefore, the plaintiff alleges that said defendant, by transacting and conducting business in this State and county as aforesaid, while a member of and a party to and while engaged in such monopoly as aforesaid, violated the provisions of said Act of January 23rd, 1905 and thereby forfeited its right to do business in this State: and that by committing said prohibited acts on the 26th, 27th, 28th, 29th, 30th and 31st days of March, 1905, the said defendant became liable to the plaintiff in the sum of Thirty Thousand Dollars, and an action

accrued to the plaintiff to recover said sum, according to the provisions of said Act.

Prayer. The premises considered, plaintiff prays judgment that the right and privileges of said defendant to do business in this State be declared forfeited and that the plaintiff have and recover of said defendant the sum of Thirty Thousand Dollars and all her costs in this suit expended, together with all expenses of the Attorney General in prosecuting same, and for all other proper relief.

(Signed) ROBERT L. ROGERS,
Attorney General, for Plaintiff.

W. L. TERRY,
J. H. STEVENSON,
W. M. LEWIS,
F. GUY FULK,
LEWIS RHOTON, *Pros. Att'y,*
Of Counsel for Plaintiff.

(Endorsed:) Filed September 30th, 1905. P. H. Carnes, Clerk. By R. B. Brodie, D. C.

12 In the Pulaski Circuit Court, Second Division.

No. 1691.

STATE OF ARKANSAS *ex Rel.* ROBERT L. ROGERS, Attorney General, Plaintiff,
vs.
HAMMOND PACKING COMPANY, Defendant.

Affidavit.

STATE OF ARKANSAS, *County of Pulaski, ss:*

Affidavit *In re* production of witnesses, books, papers, etc.

I, Robert L. Rogers, Attorney General of the State of Arkansas, do solemnly swear that I am at this time unable to designate and particularly point out the books, papers and documents which will be required in evidence on the execution of the commission which I have in this case requested, for the examination of certain witnesses in the city of Chicago, before Lyle D. Taylor, Esquire, as Commissioner: that the contents and particular description of said books, papers and documents are matters peculiarly within the knowledge of the defendants and the witnesses whose examination is prayed at said time and place, and that it is impossible and impracticable for me at this time to designate particularly the matters as to which each witness whose testimony is sought to be taken at said time and place, can testify, or to frame interrogatories to such witnesses or state at this time the substance of his evidence, for the reason that the matters as to which it is sought to examine said witnesses are matters touching the conduct and

business of the defendant company and as to which the defendant and said witnesses have peculiar and sole knowledge.

ROBT. L. ROGERS.

Subscribed and sworn to before me this 11 day of September, 1906.

[SEAL.] SAM W. WASSELL,
Notary Public.

My Commission expires April 7th, 1907.

(Endorsed:) Filed September 11th, 1906. P. H. Carnes, Clerk. By R. B. Brodie, D. C.

13 In the Pulaski Circuit Court.

No. 1691.

STATE OF ARKANSAS
vs.
HAMMOND PACKING COMPANY.

Motion that depositions be taken on interrogatories.

Comes the defendant, and in pursuance of paragraph No. 5 of Sec. 3177 of Kirby's Digest, respectfully moves the court for an order that all depositions to be taken out of Pulaski County for the use in this cause be taken upon interrogatories.

It further moves the court that all depositions to be taken outside of Pulaski County for use in this cause, under the provisions of the statute regulating the taking of evidence generally, be taken upon interrogatories.

It further moves the court that all depositions to be taken outside of Pulaski County, under the provisions of the anti-trust act upon which this suit is brought, be taken upon interrogatories.

ROSE, HEMINGWAY, CANTRELL & LOUGHBOROUGH.

Endorsed: Filed June 27th, 1906. P. H. Carnes, Clerk. By R. B. Brodie, D. C.

14 In the Pulaski Circuit Court, Second Division.

March Term, 1906.

MARCH 8TH, 1906.

1691.

STATE OF ARKANSAS *ex Rel.* ROBT. L. ROGERS, Attorney General, Plaintiff,
vs.
HAMMOND PACKING COMPANY, Defendant.

Comes the defendant by its attorneys, Rose, Hemingway, Cantrell & Loughborough, and by leave of the Court files herein its motion to require the plaintiff to make allegations of complaint more definite.

15 In the Pulaski Circuit Court, Second Division.

STATE OF ARKANSAS *ex Rel.* —— ——
vs.
HAMMOND PACKING CO.

Comes the defendant and moves the court for an order on the plaintiff to make the allegations of its complaint more definite and certain so as to show when the pool, trust, agreement, confederation, combination, or understanding charged in the complaint was made; where it was made, what its terms and conditions were, and to show in what respect it constituted a pool, trust, agreement, combination, confederation or understanding in violation of the statute, and to show the article or articles embraced within the terms of the said pool, trust, combination or confederation.

Motion to make complaint more definite, &c.

It further moves that the plaintiff be required to make the allegation of its amended complaint more definite and certain so as to show when and where the monopoly was created, and the articles controlled by it, and where the monopoly existed, so as to show the character of the union, combination, consolidation, or affiliation in such a manner that the court can on demurrer say whether the same is in violation of the law or otherwise.

ROSE, HEMINGWAY, CANTRELL & LOUGHBOROUGH.

(Endorsed:) Filed March 8th, 1906, P. H. Carnes, Clerk. By R. B. Brodie, D. C.

16 In Pulaski Circuit Court.

STATE OF ARKANSAS *ex Rel.* ROBERT L. ROGERS, Att'y Gen'l, Plaintiff,
vs.
HAMMOND PACKING COMPANY, Defendant.

Motion for Commissioner to Take Deposition of Officers, Agents, etc., of Defendant.

Comes the plaintiff, the State of Arkansas, by her Attorney General, and comes said Attorney General, as relator in the above entitled suit, and states to the Court:

Motion for appointment of Commissioner.

(1.) That the following named persons are officers, agents, directors and employees of the defendant company, to-wit: S. A. McLean, Jr., Edward Tilden, Arthur Colby, J. Ogden Armour, P. A. Valentine, Louis F. Swift, Edward F. Swift, Edward Morris, Ira N. Morris, Jesse P. Lyman, James D. Standish, Thomas J. Conners, Thomas W. Wilson, Arthur Meeker, L. A. Carton and K. K. McLaren.

Names of witnesses.

(2.) That all of said persons named in paragraph One, *supra*, reside without the State of Arkansas, and, as your relator is informed and believes, in or near the City of Chicago, Illinois.

Their residence.

(3.) That the plaintiff and your relator desire to take the testimony of said persons named in paragraph One, *supra*, in this cause, at the office of Lyle D. Taylor, in the Ashland Block, in the City of Chicago, Illinois, on the 20th day of September, 1906, or on the date or dates thereafter and the place and places, to which the taking of such testimony may from time to time be adjourned, according to law or by agreement of the parties.

Time and place where it is desired to take depositions.

(4.) That all of said persons named in paragraph One, *supra*, are unwilling and hostile witnesses, and as your relator verily believes and states, will not, in response to written interrogatories, make full and fair answers upon the matters as to which the plaintiff desires to examine them in this cause.

Witnesses unwilling and hostile.

That the facts as to the management and business methods
17 of the defendant corporation, relevant to the issues in this case and within the knowledge of the said persons aforementioned, are such that your relator can have no accurate knowledge of same until opportunity is given him to interrogate the aforesaid persons, who have peculiar and sole knowledge thereof; and that it is impossible for your relator to so frame written interrogatories to said persons as to elicit the facts within their knowledge and relevant to the issues in this cause.

Facts solely within knowledge of witnesses.

That said persons have in the- possession and under their control, and at the Chicago offices of the defendant Company, numerous books, papers and documents bearing upon the issues in this cause and relevant to the claim of the plaintiff herein; that the precise description and nature of these is peculiarly within the knowledge of the aforesaid persons; and that it is impossible for your relator to so frame written interrogatories and demands as to require the production of such books, papers and documents as aforesaid as are relevant to the issues in this cause.

(5.) That because of the hostility of said witnesses, their peculiar and exclusive means of information, their possession of the books, papers and documents necessary in evidence in this cause, and the interest which said witnesses have in concealing the truth in this cause and evading the questions propounded to them, it is necessary that their depositions be taken orally in order that the plaintiff may subject them to effective examination. That the taking of their depositions by interrogatory would be wholly ineffectual and would, in effect, deprive the plaintiff of all opportunity to compel said persons to give in evidence the facts within their knowledge, relevant to this cause.

Necessary to take depositions orally.

Wherefore the plaintiff prays that this court make an order for the taking of the testimony of said witnesses and persons orally, and for the production by them and the said defendant of any and all books,
18 papers and documents in the possession or under the control of said persons, or any of them relating to the issues in this cause.

That the court appoint as commissioner to take said testimony, Lyle D. Taylor, Esqr. of the city of Chicago, Illinois and issue to him a commission in accordance with law, authorizing him to take the testimony of said persons orally at the time and place as mentioned in Part 3, *supra*, and return the depositions of said persons in due form of law and to issue all notices and process necessary for the procurement of the attendance and testimony of said persons and production and examination of all books, papers and documents in the possession or under the control of said persons or any of them, and relevant and material to the issues in this cause.

(Signed) ROBERT L. ROGERS,
Attorney General of Arkansas, Relator and Counsel for Plaintiff.

(Endorsed:) Filed Sept. 5th, 1906. P. H. Carnes, Clerk. By R. B. Brodie, D. C.

19 In the Pulaski Circuit Court, March Term, 1906.

SEPTEMBER 8TH, 1906.

1691.

STATE OF ARKANSAS *ex Rel.* ROB'T L. ROGERS, Attorney General, Plaintiff,
vs.
HAMMOND PACKING COMPANY, Defendant.

Comes the defendant by its attorneys, Rose, Hemingway, Cantrell & Loughborough, and by leave of the court files herein its motion to require the plaintiff to make more specific her motion for commission to take depositions.

20 In the Pulaski Circuit Court.

STATE OF ARKANSAS *ex Rel.* ROBERT L. ROGERS, Attorney General, Plaintiff,
vs.
HAMMOND PACKING COMPANY, Defendant.

Motion that Plaintiff's Request for Commission to Take Deposition be Made More Specific and Definite.

Comes the defendant and moves that the court require plaintiff to specifically name in its motion for commission to take depositions in this case parties she desires to examine as witnesses and that plaintiff

be required to set out specifically what she expects to prove by each witness she desires produced and also to set out specially a particular description of any books she desires produced by any of said witnesses together with the name of the witness who is to produce them, that she be required to specifically state wherein any of said books so named are material to the issues in this case.

ROSE, HEMINGWAY, CANTRELL & LOUGHBOROUGH,
For Defendant.

(Endorsed:) Filed Sept. 8th, 1906. P. H. Carnes, Clerk. By R. B. Brodie, D. C.

21 SEPTEMBER 10TH, 1906.

1691.

STATE OF ARKANSAS *ex Rel.* ROB'T L. ROGERS, Attorney General, Plaintiff,
vs.
HAMMOND PACKING COMPANY, Defendant.

Come the parties by their respective attorneys, and it appearing to the satisfaction of the Court that the motion heretofore filed by the defendant to require the plaintiff to make the allegations of her complaint more definite and certain, was by the court overrruled on June 25th, 1906, and that the said order of the court overruling said motion was not entered of record. Thereupon on motion of defendant it is ordered that said order be entered now, to take effect as of June 25th, 1906, as follows:

Order overruling motion to make complaint more definite.

"On this day came the parties hereto by their attorneys, and the motion of the defendant to require the plaintiff to make the allegations of her complaint more definite and certain now coming on to be heard, and the court being well and sufficiently advised doth overrule said motion and each and every paragraph thereof. To which action of the court in overruling said motion, and to the overruling of each separate paragraph thereof the defendant at the time excepted, and asked that its exceptions be noted of record which is done."

22 SEPTEMBER 10TH, 1906.

1691.

STATE OF ARKANSAS *ex Rel.* ROB'T L. ROGERS, Attorney General, Plaintiff,
vs.
HAMMOND PACKING COMPANY, Defendant.

Motion that depositions be taken upon interrogatories overruled.

Come the parties hereto by their attorneys, and the motion of the defendant to have depositions taken upon interrogatories now coming on to be heard and the court being sufficiently advised doth overrule said motion and each and every paragraph thereof. To which action of the court in overruling said motion and to the overruling of

each separate paragraph thereof the defendant at the time excepted and asked that its exceptions be noted of record which is done.

Motion to make more specific the request for appointment of commissioner overruled.

And the motion of the defendant to require the plaintiff to make her motion for appointment of a commissioner to take depositions more definite and certain now coming on to be heard and the court being sufficiently advised, doth overrule said motion.

To which ruling of the court the defendant at the time excepted and asked that its exceptions be noted of record which is done.

23 SEPTEMBER 10TH, 1906.

1691.

STATE OF ARKANSAS *ex Rel.* ROB'T L. ROGERS, Attorney General, Plaintiff,

vs.

HAMMOND PACKING COMPANY, Defendant.

Come the parties by their attorneys, and the motion herein made by the plaintiff for the appointment of a commissioner to take the depositions of certain witnesses therein named in the State of Illinois, orally and the motion herein filed by the defendant that all depositions in this cause to be taken outside of the County of Pulaski to be taken upon written interrogatories, and the motion of the defendant that the aforesaid motion of plaintiff be made more specific coming on to be heard and the court being well and sufficiently advised of the matters arising thereon, doth consider that the prayer of the aforesaid motion of the plaintiff be granted, and it is so ordered, and the court doth further consider that the prayer of the aforesaid motion of defendant be denied, and it is so ordered.

It is therefore ordered by the Court that a Commission issue in the cause above named, directed to Lyle D. Taylor, 1301, Ashland Block, 59 Clark Street, in the City of Chicago, Ill. for taking of the testimony of S. A. McLean, Jr., Arthur Meeker, L. A. Carton, K. K. McLaren, Edward Tilden, Arthur Colby, J. Ogden Armour, P. A. Valentine, Louis F. Swift, Edward F. Swift, Edw. Morris, Ira N. Morris, Jesse P. Lyman, James D. Standish, Thos. J. Connors, Thos. E. Wilson, and for the production of any books, papers, and documents in the possession or under the control of either of said persons relating to the merits of said cause, or to any defense therein, and directing and empowering said commissioner to examine orally under oath each and all of said persons or such thereof as may be brought before him for examination. Provided that at such examination the witnesses and books aforesaid shall not be required to be produced at any one time in such numbers as to interfere with the operation of the defendant's business.

Commissioner appointed.

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Commissioner to give notice etc.

It is further ordered that said commissioner shall, immediately upon receipt of his commission above granted, issue a notice in writing, directed to the president or some officer or agent of the defendant corporation, notifying such president, officer, or agent that the testimony of the persons above named is desired and requesting such president, officer or agent to have such persons, together with such books, papers and documents as above referred to, at the office of the said Lyle D. Taylor, 1301 Ashland Block, 59 Clark Street, in the City of Chicago, Ill., on the 20th day of September, 1906, at 10 o'clock A. M., then and there to testify, and to have such persons to attend at said place from day to day or from time to time, if adjournment be had, until the taking of their testimony herein be completed and at such times to produce said books, papers and documents whenever demanded.

Counsel for both parties allowed to be present.

Oral examination to be reduced to writing etc.

And it is further ordered that counsel for the respective parties, or either of them, be and they are hereby authorized and allowed to attend before said commissioner upon the execution of the commission hereinbefore granted, and to orally examine and cross-examine said witnesses, or either of them; such oral examination and cross-examination to be reduced to writing by type by the commissioner, signed by said witnesses, attested in due form of law and annexed to and returned with the commission hereinbefore ordered to the clerk of the Pulaski Circuit Court. The defendant at the time saved its exceptions to the action of the Court in granting the above order, and in overruling each paragraph of the aforesaid motion of the defendant to require said deposition to be taken on written interrogatories, and to the overruling of the motion to make plaintiff set up the materiality of the witnesses and books and to describe the latter, and also particularly and severally to so much of said order as directed the defendant to produce witnesses, books, papers, and documents of either witnesses, books, papers or documents before the commissioner above named, and asked that said exceptions be noted of record.

SEPTEMBER 15TH, 1906.

1691.

STATE OF ARKANSAS *ex Rel.* —— ——, Plaintiff,
vs.
HAMMOND PACKING COMPANY, Defendant.

Comes the plaintiff by attorneys and by leave of the Court files herein an amendment to her complaint and also files an additional complaint.

27 In the Pulaski Circuit Court, Second Division.

No. 1691.

STATE OF ARKANSAS *ex Rel.*, etc., Plaintiff,

vs.

HAMMOND PACKING COMPANY, Defendant.

Amendments to Complaint at Law.

Comes the plaintiff, and by leave of the court, which is hereby prayed, makes the following amendments to its complaint herein filed on August 11, 1905, and to the Amendment thereto, filed on September 30th, 1905, as follows, to-wit:

Amendment to First paragraph of complaint.

Amend Paragraph First and page one thereof by adding thereto and in substituting for the 1st two lines thereon, the following: "Armour & Company, a corporation organized under the laws of the State of New Jersey; Swift & Company, a corporation organized under the laws of the State of Illinois; the Armour Packing Company, a corporation organized under the laws of the State of New Jersey; the Fairbank Canning Company, a corporation organized under the laws of the State of Illinois; the National Packing Company; Morris & Company, a corporation organized under the laws of the State of New Jersey; the Cudahy Packing Company, a corporation organized under the laws of the State of Illinois, the Anglo-American Provision Company, the Omaha Packing Company, the Continental Packing Company, the G. H. Hammond Company; Ruddy Brothers; Fowler Packing Company, the United Dressed Beef Company, the St. Louis Dressed Beef & Provision Company; the Hutchinson Packing Company; the Aetna Trading Company; the Oppenheimer Manufacturing Company; the Kenwood Company; S. Oppenheimer & Company; Wolf, Sayer & Heller; the G. V. Brecht Butcher Supply Company; Berth Levi & Company, Beckstein & Company and other corporations, firms, and partnerships and individuals, whose names are unknown to your relator and well known to the defendant,

Amend Paragraph Second thereof by adding at the bottom thereof, after the words "Armour & Company," the following:

Amendment to Second paragraph.

28 "The National Packing Company; Morris & Company, the Anglo-American Provision Company, the Omaha Packing Company; the Continental Packing Company; the G. H. Hammond Company; Ruddy Brothers; the Fowler Packing Company; the United Dressed Beef Company, the St. Louis Dressed Beef & Provision Company, and the Hutchinson Packing Company, and other corporations, firms, and individuals whose names are unknown to your relator and well known to the defendant."

Amendment to Third paragraph.

Amend Section Third (the Amendment to Complaint at Law) by adding thereto on page three, at the top thereof immediately after the words, " Pro-

vision Dealer's Dispatch," the following "and with the Armour Packing Company; Armour & Company; Swift & Company; the Cudahy Packing Company, Nelson Morris & Company; Morris & Company, and the Fairbanks Canning Company; and with other persons, firms and corporations to your relator unknown, whose names are well known to the defendant."

ROBERT L. ROGERS,
Attorney General, for Plaintiff.

(Endorsed:) Filed September 15th, 1906. P. H. Carnes, Clerk. By R. B. Brodie, D. C.

29 In the Pulaski Circuit Court, Second Division.

No. 1691.

STATE OF ARKANSAS *ex Rel.* ROBERT L. ROGERS, Attorney General, Plaintiff,

vs.

HAMMOND PACKING COMPANY, Defendant.

Additional Complaint.

IV.

Comes the plaintiff, the State of Arkansas, by and at the relation of Robert L. Rogers, her Attorney General, and for further cause of action against the defendant, Hammond Packing Company, states:

(19.) That said defendant is a foreign corporation, organized under the laws of the State of Illinois, and engaged in the manufacture and sale of certain articles of commerce and consumption, to-wit: Dressed Beef, pork, sheep and poultry and other food animals and the commercial products thereof, and transacting and conducting business in the State of Arkansas.

(20.) That said defendant on the — day of ——, 1906, and on each and every day thereafter, excepting Sundays, until and including the — day of ——, 1906, was engaged in the sale, at wholesale, of the aforesaid articles of commerce and consumption so manufactured and produced by it, within the State of Arkansas and in the city of Little Rock, and County of Pulaski; and maintained for said purpose a branch house and had a manager, to-wit: Mr. —— —— for its business in said city.

(21.) That on the dates and each of them, mentioned in the preceding paragraph, V. K. Brown was engaged in the slaughtering of cattle, sheep, hogs and other food animals and in the sale at wholesale in the city of Little Rock, of the commercial products thereof and particularly that of dressed beef, pork, and mutton, and in such business were competitors of, and engaged in a similar busi-
30 ness to, the defendant company.

(22.) That on the dates mentioned in paragraph 19 and on each of them, the said defendant, through its aforesaid manager or

agent and branch house at Little Rock, Arkansas, within the State of Arkansas and City of Little Rock, and County of Pulaski; (*a*) with the intent and purpose of driving out competition, and particularly that of the aforesaid V. K. Brown, and (*b*) for the purpose of financially injuring competitors and particularly the aforesaid V. K. Brown, did

Defendant sold products so as to drive out competition.

(1) sell their productions and particularly dressed beef, pork, and mutton in such a way as to drive out competition and financially injure competitors engaged in similar business and in such a way as especially to drive out the competition of the aforesaid V. K. Brown, and to financially injure them; and

(2) sell their aforesaid productions at less than cost of manufacture and production or manufacture or production contrary to the form of the statute in such cases made and provided and in violation thereof.

And at less than cost of production.

Wherefore the plaintiff alleges that said defendant by selling its aforesaid productions in the State of Arkansas in the manner and with the intent and purpose aforesaid, violated the provisions of the Act of the General Assembly of the State of Arkansas, approved January 23rd, 1905, and entitled "An Act providing for the punishment of Pools, trusts, and conspiracies, etc." and was guilty of conspiracy to form and secure a trust or monopoly in restraint of trade, and thereby forfeited its right and privilege thereafter to do business in this State.

And plaintiff further alleges that, by committing said prohibited acts on the days and dates mentioned in Paragraph 19, *supra*, and on each of them, the defendant became liable to the plaintiff in the sum of —— Dollars, and an action accrued to the plaintiff to recover said sum, according to the provisions of said Act.

The premises considered, plaintiff prays judgment that the
31 right and privilege of said defendant to do business in this State be declared forfeited and that plaintiff have and recover of said defendant — sum of —— Dollars, and all her costs in this suit expended, together with all expenses of the Attorney General in prosecuting same, as provided by said Act, and for all other proper relief.

ROB'T L. ROGERS,
Attorney General and Relator.

LEWIS RHOTON,
Prosecuting Attorney.
W. L. TERRY,
W. M. LEWIS,
F. GUY FULK, AND
JAS. H. STEVENSON,
Of Counsel for Plaintiff.

(Endorsed:) Filed September 15th, 1906. P. H. Carnes, Clerk. By R. B. Brodie, D. C.

1685 & 1906, Consolidated.

1905.

1691.

STATE OF ARKANSAS *ex Rel.* —— ——, Plaintiff,
vs.
HAMMOND PACKING COMPANY, Defendant.

1692 & 1694, Consolidated.

1693 & 1903, Consolidated.

Comes the defendant in each of the above styled causes numbered . . . 1691 . . . by their attorneys, Rose, Hemingway, Cantrell & Loughborough, and by leave of the court file herein their motion to require the plaintiff to make the allegations of its additional complaint more definite and certain.

33 In the Pulaski Circuit Court, Second Division.

STATE OF ARKANSAS
vs.
HAMMOND PACKING COMPANY.

Motion to make additional complaint more definite & certain.

Comes the defendant and states to the court that the amendment filed in this cause on the part of the plaintiff, entitled "Additional Complaint" and made a fourth cause of action against the defendant is so indefinite and uncertain in its allegations that the defendant is unable to properly plead thereto or to prepare for trial thereon.

It alleges that the defendant, with the intent and purpose of driving out competition and of financially injuring competitors, particularly Brown & Glover, sold its production in such a way as to drive out competition and financially injure competitors, including said Brown & Glover, without describing any such transaction in such a way as to identify it or to give the facts or circumstances of any such transaction in such a way as to enable this court to pass upon the question whether such transaction was in violation of law, and in such a way as not to enable this defendant to tell with what it is charged, or to prepare to meet the charge.

It further charges that the defendant sold its productions at less than the cost of manufacture and production, but it does not state when any such sale was made, who such sale was made to, or the products sold in such a way as to identify the transaction or to enable this defendant to ascertain the cost of the article sold and the price for which it was sold.

The defendant says, that without specific allegations in the particulars aforesaid, it should not be called upon to plead to the cause of action set up in the amendment, since it cannot tell whether the transaction upon which the charge is made would be in violation of law if proved as it is intended to be alleged nor can it present this question to the court for its decision, and it cannot make a preparation for trial because it has made many sales in the course of its business, and unless the transaction intended to be covered by the allegations of the amendment is identified, it is unable to ascertain the cost of the articles sold or the amount for which they were sold by it.

34

It therefore moves that the court require the plaintiff to make the allegations of its complaint more definite and certain in the particulars above set out.

ROSE, HEMINGWAY, CANTRELL & LOUGHBOROUGH.

(Endorsed:) Filed Sept. 15th, 1906. P. H. Carnes, Clerk. By R. B. Brodie, D. C.

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SEPTEMBER 15TH, 1906.

1691.

STATE OF ARKANSAS *ex Rel.* —— ——

vs.

HAMMOND PACKING COMPANY.

Upon motion of the defendant in *each of* the above styled causes leave is granted it to file an amended answer to the complaint and amendments within twenty days from this date and thereupon to withdraw the original answer from the files; and leave is given plaintiff to file amendments to its complaint on this date.

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In the Pulaski Circuit Court, Second Division.

No. 1691.

STATE OF ARKANSAS *ex Rel.* ROBERT L. ROGERS, Attorney General,

vs.

HAMMOND PACKING COMPANY.

Amended Answer.

Now comes the defendant and by leave of court files this its amended answer to the original complaint and amendments thereto in this cause, and says:

I.

Answer to first paragraph of answer.

For answer to Paragraph First of the original complaint, it denies that on the 26th, 27th, 28th, 29th, 30th or 31st day of March, 1905, it was transacting or conducting in the State of Arkansas any part of its sales business or that it maintained in said State an agent or office for the transaction of such business.

It denies that on either of said dates or any other date it had created, entered into or become a member of, or that it then was a member of or a party to any pool, trust, agreement, combination, confederation or understanding with any other corporation, partnership, individual, person or association or persons engaged in any similar line of business to that conducted by it, including any of those named in said paragraph, or any other person, company or corporation, to regulate or fix the selling price of any article of manufacture, merchandise, commodity or convenience including the commercial products of slaughtered live stock or any others, or to maintain such price when so regulated or fixed. It denies that it conducted or transacted any business in the State of Arkansas while a member of or a party to any pool, trust, combination or understanding as set out in the complaint, or otherwise or that it was a member of or a party to any such pool, trust, combination
37 or understanding while transacting any part of its business in the State of Arkansas, or that it violated the provisions of the statute sued on, or became liable to the plaintiff in the sum claimed or any other sum.

II.

Answer to Second paragraph.

For answer to paragraph Second in the complaint, defendant denies that on the 26th, 27th, 28th, 29th, 30th or 31st day of March, 1905, it was transacting or conducting business in the State of Arkansas, or had or maintained in said State an office or place for the transaction of its business. It denies that on said dates, or either of them, or on any other date, it had created, entered into or become a member of, or that it then was a member of or a party to any pool, trust, agreement, combination, confederation or understanding with any other corporation, partnership, individual, person or association of persons engaged in any similar line of business, including any of those named in said paragraph, or any other person, company or corporation, to regulate or fix the price to be paid for any article, commodity or thing, either cattle, hogs, sheep, or any other kind of live stock or food animals, or anything else, or to maintain such price when so fixed. It denies that it transacted or conducted any business in the State of Arkansas while a member of or a party to any such pool, trust, combination, or understanding, or that it violated the provisions of the statute sued on, or became liable to the plaintiff in the amount sued for or in any other amount.

III.

Answer to Third paragraph.

For answer to the Third Paragraph in the complaint, as set out in the amendment thereto, defendant denies that on the 26th, 27th, 28th, 29th, 30th or 31st day of March, 1905, it transacted or conducted any part of its business in the State of Arkansas, or that it had or maintained in said State an agent or officer for the transaction of
38 its business. It denies that on said dates or either of them, or on any other date, it was engaged in a monopoly within the

intent or meaning of the act sued on, said monopoly being effected or created by means of any union, combination, consolidation or affiliation of capital, credit, property, assets, trade, customs, skill, acts or other valuable things or possessions, or in any other way, by and between it and any other person, firm, corporation, or association of persons firms or corporations, including those named in the said paragraph, or any others not named, whereby the price of any article of manufacture, merchandise, commodity, convenience or other valuable article or thing, either slaughtered live stock and food animals or their commercial products and commodities manufactured therefrom or anything else or the price for the transportation of the same or any article in refrigerator cars or elsewhere, was regulated or fixed or maintained when so regulated and fixed or whereby the amount, quality and quantity of the aforesaid articles of manufacture, commodity, merchandise, convenience or other valuable article or thing was fixed and limited, or whereby any of the ends of regulating or fixing or of maintaining when regulated and fixed the price of any article or things of value, or of fixing or limiting the quantity of any of such articles or things was sought to be accomplished or whereby any such ends were promoted or sought to be executed or carried out, or whereby any such ends were reasonably calculated to be produced. It denies that it conducted business in the State of Arkansas while a member of or a party to or while engaged in any monopoly, as described in said paragraph or in violation of the statute sued on or that it became liable to the State of Arkansas, in the sum sued for or in any other sum.

IV.

For answer to the Fourth Paragraph in the complaint, which is entitled "An Additional Complaint," defendant says:

39 Answer to Fourth paragraph.

It denies that on the dates mentioned in the complaint or any of them, it was engaged in the sale at wholesale of any article of commerce or consumption or manufacture produced by it in the State of Arkansas at wholesale, or maintained a branch house in the State for such purpose, except as was necessary to complete the sale of articles shipped from other States into the State of Arkansas and there delivered in original packages. It denies that on said dates V. K. Brown and E. D. Glover were competitors of it. It denies that on said dates, or any of them, through its manager or agent or branch house in Little Rock, or in any other way, it sold in the State of Arkansas any of its products, those mentioned in the complaint or any other, in such way as to drive out competition or financially injure competitors, either Brown & Glover, or any other person, or that it sold its production at less than cost of manufacture and production or of manufacture or production with the intent or purpose of driving out competition of Brown & Glover or any other person, or for the purpose of financially injuring Brown & Glover or any other person. It denies that it sold any of its productions in the State of Arkansas in the manner or with the intent charged in the said paragraph of

the complaint or that it became liable to the plaintiff in the sum claimed or in any other sum.

V.

The defendant, for further answer to the complaint as amended says:

Not a member of any pool or trust to fix or regulate prices.

That it never conducted any business in the State of Arkansas while it was a member of or a party to any pool, trust, combination, confederation or agreement for the purpose of fixing or regulating the price of any article of merchandise, manufacture, convenience or any article or thing of any value of any kind whatsoever, or while it was a monopoly as defined by the statute or as alleged in the complaint, or while it was a monopoly at all, and it here denies each and every allegation of each paragraph of the complaint as amended which in any way charges it with being a member of or a party to any such pool, trust, combination, confederation or agreement, whether the same is formally set out in the complaint or in any other way, or which charges it with being a monopoly, whether the same was created or effected in the manner set out in the complaint or in any other manner; and it alleges that it was not on the dates charged in the complaint or at any other time a member of or a party to any pool, trust and that it was not a monopoly as is alleged in the complaint or in any other way, and it intends this allegation to be a specific denial of each and every allegation of each paragraph in the complaint with respect to such charges.

Not a monopoly.

VI.

The defendant further answering says:

Defendant complied with all laws of Arkansas.

That it is a corporation organized under the laws of the State of — having among its objects the buying of live stock and the manufacture and sale of its products. That it was so organized several years prior to January 1st, 1905. That desiring to do business in the State of Arkansas, it complied with all the provisions in the laws of said State in regard to the admission of foreign corporations to do business therein.

Filed all papers required by statute and paid license fees.

Obtained license.

That it duly filed with the proper officers of the said State all the papers required by its statutes to be filed by the defendant before and as a condition of its doing business therein and paid to the proper officers of the said State all license fees prescribed. That it thereupon obtained a license from said State to do business therein and the said State thereby contracted with it that it might conduct its business therein. That thereupon the defendant became duly authorized to do business in said State, and in reliance upon its authority invested large sums of money in the purchase of real and personal property situated in said State, and in establishing and promoting its sales business therein, and

Invested large sums of money in the State.

41 continually since it was so admitted and authorized to do business in said State it has conducted a portion of its business therein and the portion so conducted has been at most times exclusively and at all times largely, a part of interstate commerce. That if it is denied the right to continue its business therein a large part of its investments will be lost and its property practically confiscated, such investments and properties being of large value for the uses of defendant but of little market value and of little value for other uses.

Conducted an interstate business.

Investments will be lost if denied its rights.

Large sums expended in license fees and establishing business.

The defendant alleges that it has expended large sums of money in the payment of license fees to the State of Arkansas and in establishing a business therein and in bringing its products and their advantageous uses to the knowledge of customers and in establishing agencies to secure purchasers for its productions.

That it has thereby acquired a good-will and business of great value to it if it is permitted to carry on said business, but that such value will be destroyed if defendant is deprived of the right to do business in this State.

Its business a part of interstate business.

The defendant further alleges that its business in Arkansas consists at all times largely of shipments made from other States into the State of Arkansas and of shipments made from the State of Arkansas into other states for delivery in original packages and comprised a part of the interstate commerce of the country. That if the defendant violated the statute sued on in any respect it was while engaged in interstate commerce as aforesaid, and the statute thus attempts to regulate and restrict the interstate commerce of the country.

The defendant further alleges that it has done nothing since the passage of the statute or at any time within the State of Arkansas in violation of the provisions of said statute, and the recovery is sought in this action for alleged transactions that took place wholly outside of the State of Arkansas and in other States and at a

Recovery is sought on account of transactions outside this State.

42 time prior to the passage of the statute, and if such transactions are in violation of the terms of the statute it is void under the Constitution of the United States and of the State of Arkansas because it seeks to punish past transactions and is therefore *ex post facto* and because through it the said State of Arkansas seeks to exercise authority beyond its limits and to deprive this defendant of its property and privileges on account of acts done in other States and the Statute is therefore not due process of law.

Statute in violation of Federal and State Constitutions.

The defendant alleges that it has done nothing in violation of the provisions of said statute, but if any of its acts, transactions, contracts, or agreement- are in violation of the provisions of the statute by rea-

son of the facts hereinbefore set forth and also as appears on the face of the said statute, the same is wholly void as against this defendant. If it is held to apply to this defendant, it is invalid as against it under the provisions of the Constitution of the United States as above set out and for the reasons (1) that said Act impairs the obligation of a contract between the defendant and the said State of Arkansas, to-wit: the contract under which, under the facts as hereinbefore set forth, said defendant was permitted to transact business within the State of Arkansas on complying with the provisions of the statutes of said State of Arkansas, regulating the admission of foreign corporations into said State to do business therein, contrary to the provisions of Article *L*, Section 8 of said Constitution of the United States; (2) that said act denies to this defendant the equal protection of the laws, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States; (3) that said act deprives this defendant of its property without due process of law, contrary to the provisions of said Fourteenth Amendment; (4) that said act is, as to this defendant, an *ex post facto* law, and is in contravention of the provisions of section 10, of Article I of the Constitution of the United States; and (5) that said act interferes with the conduct of the business of the defendant between the State of Arkansas and other States and foreign countries, and is invalid as an interference with interstate commerce, and in violation of the Commerce clause of the United States Constitution.

Act impairs the obligation of a contract.

Denies the equal protection of the laws.

Violates 14th Amendment.

Is *ex post facto*.

Interfers with interstate commerce.

The defendant further sets up and insists that said act of January 23, 1905, is also invalid as against this defendant under the provisions of the Constitution of the State of Arkansas, for the reasons (1) that it impairs the obligation of said contracts, as above referred to, between the defendant and said State of Arkansas; and (2) that said act denies to this defendant the equal protection of the laws, and also deprives this defendant of its property without due process of law.

Having answered in full defendant asks that it be dismissed with its costs.

ROSE, HEMINGWAY, CANTRELL & LOUGHBOROUGH,
Attorneys for Defendant.

(Endorsed:) Filed October 5th, 1906. P. H. Carnes, Clerk. By R. B. Brodie, D. C.

44 SEPTEMBER 15TH, 1906.

1685 & 1906, Consolidated.

1905.

1691.

STATE OF ARKANSAS
vs.
HAMMOND PACKING CO.

1692 & 1904, Consolidated.

1693 & 1903, Consolidated.

Motion sustained to make additional complaint more definite.

On this day comes on the motion of the defendant in each of the above styled causes for a rule on plaintiff to make the allegations of its additional complaint more definite and certain and both parties appearing by their attorneys and the court being fully advised in the premises, it is ordered that the motion be sustained, and the plaintiff is ruled to make the allegations of its additional complaint definite and certain by amendment thereto to be filed on or before Oct. 10th, next.

45 In the Pulaski Circuit Court, Second Division, September Term, 1906.

OCTOBER 5TH, 1906.

1691.

STATE OF ARKANSAS *ex Rel.* ROB'T L. ROGERS, Attorney General, Plaintiff,
v.
HAMMOND PACKING COMPANY, Defendant.

Now on this day comes the plaintiff by its attorneys, and the defendant by its attorneys, and on motion of the defendant leave is granted it to file a demurrer to the complaint, which is at once done.

And the defendant in pursuance of the leave heretofore granted files its amended answer to the complaint in this cause as amended, and the original answer in this cause is by leave of the court withdrawn from the files.

See page 37 for Amended Answer.

46 In the Pulaski Circuit Court.

No. 1691.

STATE OF ARKANSAS, *ex Rel.* ROBT. L. ROGERS, Attorney General,
vs.
HAMMOND PACKING COMPANY.

Demurrer to Complaint.

Comes the defendant and by leave of the court files this its demurrer to the Complaint as amended, and for ground alleges:

I.

It demurs to the first paragraph of the complaint:

1. Because the allegations of the said paragraph do not constitute a cause of action against the defendant.

2nd. Because it does not appear from the allegations of the said paragraph that the defendant had created, entered into, or become a member of, or a party to, any pool, trust, agreement, combination, confederation or understanding with any corporation, partnership, individual, or association of persons in the State of Arkansas, or to regulate or fix the price at which any article of manufacture, merchandise, commodity or convenience should be sold within the State of Arkansas.

3rd. Because the statute upon which the action is brought attempts to impose a penalty for acts done outside the State of Arkansas and is unconstitutional and void under the Fourteenth Amendment to the Constitution of the United States, and under Section 21, Article 2 of the Constitution of Arkansas.

II.

The defendant demurs to the second paragraph of the complaint, and for ground alleges:

1st. Because the allegations of the said paragraph do not
47 constitute a cause of action against the defendant.

2nd. Because it does not appear from the allegations of the said paragraph that the defendant had created, entered into, or become a member of or a party to any pool, trust, agreement, combination, confederation or understanding with any corporation, partnership, individual or association of persons in the State of Arkansas, or to regulate or fix the price at which any article of manufacture, merchandise, commodity or convenience should be sold within the State of Arkansas.

3rd. Because the statute upon which the action is brought attempts to impose a penalty for acts done outside the State of Arkansas and is unconstitutional and void under the Fourteenth Amendment to the Constitution of the United States, and under Section 21, Article 2 of the Constitution of Arkansas.

III.

The defendant demurs to the amendment to the complaint which attempts to set up a third cause of action, and for ground alleges:

1st. That it does not appear from the allegations thereof that the defendant was engaged in any monopoly in the State of Arkansas, or that it was engaged in a monopoly which was effected or created in the State of Arkansas, or that it was engaged in a monopoly whereby the price to be charged in Arkansas for any article of any kind was regulated or fixed, or maintained when regulated or fixed, or whereby the amount or quantity of any such article in the State of Arkansas was fixed or limited, or whereby the end of regulating or fixing or maintaining when regulated or fixed the price in Arkansas of any such Article or thing, or of fixing or limiting the quantity of any such article or thing in Arkansas was sought to be accomplished; or whereby such ends were promoted or sought to be executed or carried out in Arkansas, or whereby such ends were reasonably calculated to be produced in Arkansas.

48 2nd. Because the allegations thereof do not constitute a cause of action against this defendant.

3rd. Because the act upon which the cause of action is based is unconstitutional and void under the Fourteenth Amendment to the Constitution of the United States, and under Section 21, Article 2 of the Constitution of the State of Arkansas.

IV.

The defendant demurs to the Fourth Paragraph in the complaint, which is entitled an "Additional Complaint" and for ground alleges:

1st. That the facts alleged do not constitute a cause of action against the defendant.

2nd. Because the act upon which the cause of action is based is unconstitutional and void under the Fourteenth Amendment to the Constitution of the United States, and under Section 21, Article 2, of the Constitution of Arkansas.

ROSE, HEMINGWAY, CANTRELL & LOUGHBOROUGH,
Attorneys for Defendant.

(Endorsed:) Filed October 5th, 1906. P. H. Carnes, Clerk. By R. B. Brodie, D. C.

49 September Term, 1906.

OCTOBER 8TH, 1906.

1691.

STATE OF ARKANSAS *ex Rel.* ROBERT L. ROGERS, Attorney General, Plaintiff,

vs.

HAMMOND PACKING COMPANY, Defendant.

Now on this day come the parties by their respective attorneys and file a stipulation which the Court orders spread upon the record, and is as follows:

"STATE OF ARKANSAS, *County of Pulaski, ss:*

In the Circuit Court.

STATE OF ARKANSAS

vs.

HAMMOND PACKING COMPANY.

Complaint at Law.

Stipulations of parties. It is stipulated by and between the parties to this suit, the State of Arkansas represented by her Attorney General, and the defendant by its attorneys, Rose, Hemingway, Cantrell & Loughborough, that if the defendant fails to produce the witnesses, and books, papers and documents called for in the order heretofore made by the Honorable the Pulaski Circuit Court and if the plaintiff shall file a motion in pursuance of the Statute of the State of Arkansas to strike the answer and other pleadings of the defendant from the files and for a judgment by default, and if said motion is sustained and a judgment by default rendered for a money penalty in favor of the plaintiff against the defendant, in such event the judgment shall be entered on the first count of the complaint and for the sum of Ten Thousand Dollars ($10,000.); that the defendant may prosecute an appeal to the Supreme Court of Arkansas which is to be done with all reasonable speed and expedition, and in case of an adverse decision by the Supreme Court of Arkansas it may further prosecute with all
50 reasonable speed and expeditions, its writ of error to the Supreme Court of the United States; and that the enforcement of the judgment shall be suspended until the final decision of the cause in the Court of Last Resort.

(Signed) STATE OF ARKANSAS,
By ROB'T L. ROGERS, *Attorney General.*
LEWIS RHOTON,
By DE E. BRADSHAW,
JAS. H. STEVENSON,
W. M. LEWIS,
F. GUY FULK, *Of Counsel.*
HAMMOND PACKING COMPANY,
By ROSE, HEMINGWAY, CANTRELL & LOUGHBOROUGH, *Its Counsel.*"

51

OCTOBER 8TH, 1906.

1691.

STATE OF ARKANSAS *ex Rel.* ROB'T L. ROGERS, Attorney General, Plaintiff,

vs.

HAMMOND PACKING COMPANY, Defendant.

Comes the plaintiff by Attorneys, and by leave of the court files herein a motion to strike the pleadings of the defendant from the files and for a default judgment against the defendant.

52 In Pulaski Circuit Court, Second Division.

No. 1691.

STATE OF ARKANSAS *ex Rel.* ROBERT L. ROGERS, Attorney General, Plaintiff,

vs.

HAMMOND PACKING COMPANY, Defendant.

Motion for Default Judgment, Etc.

Comes the plaintiff, the State of Arkansas, by and at the relation of Robert L. Rogers, her Attorney General, and represents and states to the court in pursuance to Section Eight of the Act of the General Assembly of the State of Arkansas, approved January 23, 1905, and entitled "An act providing for the punishment of Pools, Trusts and Conspiracies etc." on the 5th day of September, 1906, the said Robert L. Rogers, Attorney General, as aforesaid, as relator, did file in this court, in term time, a statement in writing setting forth and stating that J. Ogden Armour, S. A. McLean, Jr., Edward Tilden, Arthur Colby, P. A. Valentine, Louis F. Swift, Edward F. Swift, Edward Morris, Ira N. Morris, Jesse P. Lyman, James D. Standish, Thomas J. Conners, Thomas E. Wilson, Arthur Meeker, L. A. Carton and K. K. McLaren were officers, agents, directors and employees of the defendant, the Hammond Packing Company and non-residents of the State of Arkansas and resided in the State of Illinois and at or near the City of Chicago; and praying the issuance of a commission and the appointment as Commissioner of Lyle D. Taylor of Chicago, Illinois; and setting forth that he, the said relator, desired said persons to appear before said Commissioner, in the City of Chicago, Illinois, at his office at Room 1301 Ashland Block, 59 Clark Street, on the 20th day of September, 1906, at ten A. M., then and there to testify, and produce such books, papers and documents as might be in their possession or under their control, relating to the merits of this suit or any defense therein, as might be required.

Motion for default judgment.

That on the 10th day of September, 1906, this Honorable
53 Court made an order for the taking of the testimony of the aforesaid witnesses and for the production of and books, papers and documents in their possession or under their control, relating to

the merits of this suit or to any defence therein; and appointed Lyle D. Taylor as Commissioner for such purpose.

That said Commissioner did immediately upon receipt of his commission, issue and cause to be served in due form of law notices directed to Rose, Hemingway, Cantrell & Loughborough, as Attorneys of record for the defendant, and to Edward Tilden, the President of the defendant company, notifying them that the testimony of the aforesaid persons named in the application of the Attorney General was desired and requesting said Attorneys of record and said president of the defendant company, to have said officers, agents, directors and employees at the office of the Commissioner, Lyle D. Taylor, at Room 1301 Ashland Block, 59 Clark street Chicago, Illinois, on the 20th day of September, 1906 at ten A. M. then and there to testify.

Commissioner caused notice to be served on counsel & on president of company.

That on the 20th day of September, 1906, the parties appeared by their attorneys, the State of Arkansas by her Attorney General, Robert L. Rogers and other Counsel, and the defendant by its counsel, W. E. Hemingway, and by consent the taking of depositions was postponed until ten A. M., of September 27th, 1906, at the same place.

Taking of depositions postponed by consent.

That on September 27th, 1906, at ten A. M., the parties again appeared by their attorneys aforesaid and, by consent the taking of depositions was postponed until ten A. M. October 1st, 1906, at the same place.

Further postponed by consent.

That on October 1st, the parties again appeared by their attorneys aforesaid and the taking of depositions being resumed, on motion of Attorney General on behalf of the plaintiff the Commissioner notified the defendant to produce J. Ogden Armour on October 2nd, at ten A. M., at the office of Lyle D. Taylor, aforesaid, then and there to testify; thereupon on motion of the defendant, the further taking of depositions was adjourned until ten A. M. on October 2nd, 1906, at the same place.

Defendant notified to produce J. Ogden Armour.

54 And on the said 2nd day of October, 1906, at ten A. M., the parties appeared by their attorneys aforesaid and the defendant company did then and there, by its attorney, W. E. Hemingway in open session of the Commission and also by written letter addressed to the Commissioner (as shown by the record and return of said Commissioner) did refuse to produce for examination J. Ogden Armour or any of the persons or any of the books, papers or documents named in the application of the Attorney General, and said persons failed to appear or testify, as will more fully appear from the return and record of said Commissioner herein filed.

Defendant refused to produce witness Armour or any persons, books etc.

Prayer to Strike out all defendant's pleadings & for judgment.

Wherefore the Attorney General, as relator in this cause, prays the court to strike out all answers, demurrers, motions, replies, or other pleadings filed by the defendant in this cause, and render in favor of the plaintiff, the State of Arkansas, a default judgment in this cause for Ten Thousand Dollars, as penalties for the violation of the Act of the General Assembly of the State of Arkansas, approved January 23rd, 1905 on the days and dates set forth in the complaint herein, and for all costs in this cause incurred.

(Signed) ROB'T L. ROGERS,
Attorney General and Relator.

LEWIS RHOTON,
Prosecuting Attorney,
W. L. TERRY,
W. M. LEWIS,
F. G. FULK, AND
JAS. H. STEVENSON,
Of Counsel.

We hereby acknowledge service of above motion and waive formal notice thereof on behalf of the defendant, the Hammond Packing Co. this Oct. 8th, 1906.

ROSE, HEMINGWAY, CANTRELL & LOUGHBOROUGH,
Attorneys for Defendant.

(Endorsed:) Filed October 8th, 1906. P. H. Carnes, Clerk. By R. B. Brodie, D. C.

55

OCTOBER 25TH, 1906.

1691.

STATE OF ARKANSAS *ex Rel.* ROBERT L. ROGERS, Attorney General, Plaintiff,
vs.
HAMMOND PACKING COMPANY, Defendant.

Comes the defendant by Rose, Hemingway, Cantrell & Loughborough, its attorneys, and by leave of the court files herein its response to the plaintiff's motion to strike the pleadings of the defendant and render default judgment against it. And comes the plaintiff by Rob't L. Rogers, Attorney General, and by leave of the Court files her motion to strike out certain portions of Response of defendant to plaintiff's motion for default judgment.

56 In the Pulaski Circuit Court, Second Division.

No. 1691.

STATE OF ARKANSAS *ex Rel.* ROBERT L. ROGERS, Att'y Gen., Plaint

vs.

HAMMOND PACKING COMPANY, Defendant.

Response to Motion to Strike the Pleadings of the Defendant and Render Judgment against it by Default.

Response. Comes the defendant, and for response to the mot filed by the plaintiff to strike its pleadings, includ its demurrer and answer, from the file, and to render judgm against it by default, says, that it protests against the granting the said motion and submits that the prayer thereof be denied the following reasons, to-wit:

Order not in conformity to statute. 1. That the order was not made in conform to the statute, and a failure to comply with it sho not subject the defendant to the penalties invok

2. That the statute does not contemplate making of a showing that several persons included within the or had knowledge of facts that were material, relevant, and prope be proved in the cause. That the order in this cause was with such showing, and a failure to comply with it should not subject defendant to the penalty invoked.

Showing contemplated by the statute. 3. That the statute does not intend an orde be made for the production of books, papers documents, except upon a showing that there books, papers, or documents under the contro the defendant which contain information pertinent to the issue the cause and which are sufficiently described to be identified. the making of the order in this case was not authorized

57 the statute, or such as the defendant could possibly h complied with.

No information to defendant what part of the books, papers etc. it should produce. Its books, papers and documents are very luminous and would fill several rooms the siz an ordinary office. Neither the applicatio the plaintiff, nor the order of the Court, for t production, in any way informed the defen what part of this large mass of books, pa and documents it was expected to produce.

The production of all would have been expensive, troubles vexatious and ruinous, yet if less than all was intended, the def ant had no means of knowing what part it should produce and production of any of its books, papers, and documents would exposed to the public, including its business competitors, the cu and unfriendly, its private business affairs and transactions, were in no way connected with or material or relevant to the i in this cause.

Order unreasonable.

It therefore submits that the order was unreasonable and not authorized by the statute, and that the defendant cannot be punished for failure to comply with it.

Reasons why the order was improvidently and erroneously made.

4. At the time when the order was made and prior thereto the allegations of the complaint were not sufficiently definite and certain to show what particular acts or transactions of the defendant were relied upon as a cause of action; or that they were sufficient in law to sustain the charge; or to inform the defendant what it should prepare to meet at the trial. In order that the defect might be cured, the defendant presented a motion to have the complaint made more definite and certain, but the Court overruled its said motion and ordered the defendant to produce the witnesses named in the order, and its books, papers, and documents, in no way identified. The defendant respectfully submits, that if such an order could have been made properly at all, it should not have been done until the defects above referred to in the complaint were cured and the defendant was in a position to proceed to the taking of testimony with the proper understanding of the matters intended to be
58 charged against it in the complaint.

Wherefore, the defendant respectfully says that the order was improvidently and erroneously made, and that its failure to obey it should not subject it to the penalties invoked.

The court erred in not requiring the depositions to be taken upon interrogatories.

5. That by the statute of Arkansas it is provided that upon application of either party the court shall order all depositions to be taken out of the county where the action is pending to be taken on interrogatories, and in pursuance of said provision this defendant, prior to the making of the order referred to in plaintiff's motion, presented an application to this Honorable Court for an order that all depositions to be taken out of Pulaski County should be taken on interrogatories; but the court overruled the motion, and thereafter made the order referred to, and the defendant respectfully submits that the court erred in making an order upon it to produce witnesses, books, papers and documents to be used in taking depositions that were not to be taken on interrogatories after it had presented its application above referred to; and that a failure to obey such order should not subject the defendant to the penalties prescribed by the act.

The statute is unconstitutional.

6. The statute upon which the action is based is unconstitutional (1) because it prescribes punishment for past transactions and is therefore *ex post facto* and violates Section 17, Article 2 of the Constitution of Arkansas, and Section 10, Article 1, of the Constitution of the United States. (2) It prescribes penalties for acts done and transactions occurring wholly outside of the State of Arkansas but in other States, and its enforcement would deprive the defendant of its property without due process of law in violation of Section 8

and 21, Article 2 of the Constitution of Arkansas and of the Fourteenth Amendment of the Constitution of the United States. (3) It denies to persons within the State the equal protection of its laws, and is invalid under Section 3, Article 2 of the Constitution of Arkansas, and the Fourteenth Amendment to the Constitution
59 of the United States. (4) It seeks to deprive corporations authorized by the State to do business therein of their rights under their contracts with the State, and violates Section 17, Article 2, of the Constitution of Arkansas, and Section 10, Article 1, of the Constitution of the United States.

7. The provision of the statute which authorizes the court to make an order for the production of books and papers is unconstitutional and void, (1) because it deprives the defendant of its right to have the witnesses against it produced in person and to be confronted by them at the trial in violation of Section 10, Article 2, of the Constitution of Arkansas, and of Article VI of the Amendment- of the Constitution of the United States. (2) It subjects the defendant to unreasonable search and seizure of its books, papers, and documents, and calls upon it to produce evidence against itself in a penal action, while the plaintiff in this cause and defendants in other causes are not subjected to such requirements, and thereby violates the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States, and Section- 8, 10, and 15, of Article 2, of the Constitution of Arkansas.

8. The defendant was ordered to produce the books, papers and documents relating to any defense it had to the action. This was unreasonable and unjust, and denied to the defendant its right to protect its property and the equal protection of the law to which it was entitled under Section- 3, 15 and 21, of Article 2 of the Constitution of Arkansas and under the Fourteenth Amendment to the Constitution of the United States.

9. The defendant could not be required to obey the order made as a condition to being heard in its defense, and the court cannot deny it the right to be heard as a punishment for such disobedience. But such an order would deny to defendant its right to protect its property and to have justice freely and without *purchase*, completely and without denial and would deprive the defendant of its
60 property without due process of law, and would deny to it the equal protection of the laws in violation of sections 2, 8, 13 and 21 of Article 2 of the Constitution of Arkansas, and of the Fourteenth Amendment to the Constitution of the United States.

10. That to strike the defendant's pleadings and render judgment against it by default, would deny to it the equal protection of the laws and deprive it of its property without due process of law, in violation of section- 3, 8 and 21 of Article 2 of the Constitution of Arkansas and of the Fourteenth Amendment of the Constitution of the United States.

Respectfully submitted.

ROSE, HEMINGWAY, CANTRELL & LOUGHBOROUGH.

(Endorsed:) Filed October 25th, 1906. P. H. Carnes, Clerk. By R. B. Brodie, D. C.

61 In the Pulaski Circuit Court, Second Division.

No. 1691.

STATE OF ARKANSAS *ex Rel.* R. L. ROGERS, Attorney General, Plaintiff,

vs.

HAMMOND PACKING COMPANY, Defendant.

Motion to Strike Portions of Response of Defendant to Motion for Default Judgment.

Comes the plaintiff by Robert L. Rogers, her Attorney General and moves the court to strike paragraph- 1, 2, 3, 4 and 5, of the Response herein filed by defendant to the Motion to strike Pleadings and render Default Judgment, because said paragraphs reiterate objections to the pleadings and questions to the issuance and form of the commission and order of examination, which have already been ruled upon by the court in the progress of this cause.

And the plaintiff moves the court to strike any and all portions of said response which in any way attempt to reiterate objections already passed upon by the court in this cause.

ROBERT L. ROGERS,
Attorney General, for Plaintiff.

(Endorsed:) Filed October 25th, 1906. P. H. Carnes, Clerk. By R. B. Brodie, D. C.

62

OCTOBER 27TH, 1906.

1691.

STATE OF ARKANSAS *ex Rel.* ROBERT L. ROGERS, Attorney General, Plaintiff,

vs.

HAMMOND PACKING COMPANY, Defendant.

On this day come the parties by their attorneys and the defendant by leave of the court files its Response to the motion of plaintiff to strike the pleadings of defendant from the files and render judgment by default.

And the plaintiff by leave of the Court files its motion to strike out certain paragraphs and portions of said response, on the ground that the same reiterates matters already passed upon by the court in the progress of this cause, and, the court being sufficiently advised, doth overrule said motion. The plaintiff at the time saved its exceptions, and asked that same be noted of record.

63 OCTOBER 27TH, 1906.

1691.

STATE OF ARKANSAS *ex Rel.* ROB'T L. ROGERS, Attorney General,

vs.

HAMMOND PACKING COMPANY.

Now on this day come the parties by their respective attorneys of record, and the motion of the plaintiff to strike from the files the demurrer and answer of defendant to the complaint as amended, and to render judgment by default, and upon the response thereto, coming on to be tried, and the Court having heard the evidence introduced in support of the motion and of the remonstrance, and the argument of counsel and being sufficiently advised in the premises, it is considered and adjudged that the answer and demurrer of the defendant and all other motions and pleadings of the defendant, except the response above referred to, be and they are hereby stricken from the files, to which action of the court the defendant at the time excepted.

Motion sustained to strike out defendant's pleadings.

And the court doth further consider, order and adjudge that the defendant is in default and that judgment be rendered against said defendant in favor of the plaintiff in the amount set out in the stipulation on file in this cause for the sum of Ten Thousand Dollars, upon the first paragraph of the complaint in this cause, for violation of the law, as therein set out on the days and dates therein mentioned, and it is so ordered.

Defendant adjudged to be in default.

It is therefore considered, ordered and adjudged that the plaintiff have and recover of and from the defendant the sum of Ten Thousand Dollars and all its costs in its behalf expended in full of its demands under the complaint herein; but that the execution of this judgment be stayed in accordance with the stipulation of the parties above referred to, pending any appeal which may be prosecuted from this judgment to the Supreme Court of this State and to the Supreme Court of the United States, to which action of the court in rendering judgment against it by default the defendant at the time excepted.

Judgment.

Its execution stayed.

64

65 OCTOBER 27TH, 1906.

1691.

STATE OF ARKANSAS *ex Rel.* ROB'T L. ROGERS, Attorney General,

vs.

HAMMOND PACKING COMPANY.

Now on this day come the parties by their respective attorneys, and the defendant files a motion to set aside the judgment in this cause, and for a new trial, and the same having been heard by the court, and the court being well and sufficiently advised, orders that the same be overruled, to which action of the court in overruling the motion defendant at the time excepted.

Motion for new trial overruled.

Whereupon, the defendant asked leave to file its bill of exceptions within twenty days from this date, which is granted by the court, and defendant prayed an appeal to the Supreme Court of Arkansas, which is likewise granted.

66 In the Pulaski Circuit Court.

1691.

STATE OF ARKANSAS *ex Rel.* ROBERT L. ROGERS, Attorney General,
vs.
HAMMOND PACKING COMPANY.

Motion of Defendant to Set Aside Judgment and for a New Trial.

Comes the defendant and respectfully moves the Court to set aside the judgment rendered against it by default in this cause, and to grant it a new trial, and for ground alleges:

I.

That the Court erred in striking its demurrer to the complaint from the files.

II.

That the Court erred in striking its answer to the complaint from the files and rendering judgment against it by default for the following reasons:

1. That the order upon it to produce witnesses, books, papers, and documents was not made in conformity to the statute and a failure to comply with it should not subject the defendant to the penalties invoked.

2. That the statute does not contemplate the making of an order for the production of witnesses in the absence of a showing that the several persons included within the order had knowledge of facts that were material, relevant, and proper to be proved in the cause. That the order in this cause was without such showing, and a failure — comply with it should not subject the defendant to the penalty invoked.

3. That the statute does not intend an order to be made
67 for the production of books, papers, or documents, except upon a showing that there are books, papers, or documents, *except* under the control of the defendant which contain information pertinent to the issues in the cause and which are sufficiently described to be identified, and the making of the order in case was not authorized by the statute, or such as the defendant could possibly have complied with. Its books, papers and documents are very voluminous and would fill several rooms the size of an ordinary office. Neither the application of the plaintiff, nor the order of the court for their production, in any way informed the defendant what part of this large mass of books, papers and documents it was expected to produce. The production of all would have been expensive, trouble-

some, vexatious and ruinous, yet if less than all was intended, the defendant had no means of knowing what part it should produce. And the production of any of its books, papers, documents would have exposed to the public, including its business competitors, the curious and unfriendly, its private business affairs and transactions, that were in no way connected with or material or relevant to the issues in this cause. It therefore submits that the order was unreasonable and not authorized by the statute, and that the defendant cannot be punished for failure to comply with it.

4. At the time when the order was made and prior thereto the allegations of the complaint were not sufficiently definite and certain to show what particular acts or transactions of the defendant were relied upon as a cause of action; or that they were sufficient in law to sustain the charge; or to inform the defendant what it should prepare to meet at the trial. In order that the defect might be cured, the defendant presented a motion to have the complaint made more definite and certain, but the court overruled its said motion and ordered the defendant to produce the witnesses named in the order, and its books, papers and documents, in no way identified. The defendant respectfully submits that if such an order could have
68 been made properly at all, it should not have been done until the defects above referred to in the complaint were cured and the defendant was in a position to proceed to the taking of testimony with the proper understanding of the matters intended to be charged against it in the complaint.

Wherefore the defendant respectfully says that the order was improvidently and erroneously made, and that its failure to obey it should not subject it to the penalties invoked.

5. That by the statute of Arkansas it is provided that upon application of either party the court shall order all depositions to be taken out of the county where the action is pending to be taken on interrogatories, and in pursuance of said provision this defendant, prior to the making of the order referred to in plaintiff's motion, presented an application to this Honorable Court for an order that all depositions to be taken out of Pulaski County should be taken on interrogatories but the court overruled the motion, and thereafter made the order referred to, and the defendant respectfully submits that the court erred in making an order upon it to produce witnesses, books, papers, and documents to be used in taking depositions that were not to be taken on interrogatories after it has presented its application above referred to; and that a failure to obey such order should not subject the defendant to the penalties prescribed by the act.

6. The statute upon which the action is based is unconstitutional, (1) because it prescribed punishment for past transactions and is therefore *ex post facto* and violates Section 17, Article 2 of the Constitution of Arkansas, and Section 10, Article 1 of the Constitution of the United States. (2) It prescribes penalties for acts done and transactions occurring wholly outside of the State of Arkansas, but in other States, and its enforcement would deprive the defendant of

its property without due process of law in violation of Sections 8 and 21, Article 2 of the Constitution of Arkansas and of
69 the Fourteenth Amendment of the Constitution of the United States. (3) It denies to persons within the State the equal protection of its laws, and is invalid under Section 3, Article 2 of the Constitution of Arkansas, and the Fourteenth Amendment to the Constitution of the United States. (4) It seeks to deprive corporations authorized by the State to do business therein of their rights under their contracts with the State, and violates Section 17, Article 2 of the Constitution of Arkansas, and Section 10, Article 1 of the Constitution of the United States.

7. The provision of the statute which authorizes the court to make an order for the production of books, and papers is unconstitutional and void (1) because it deprives the defendant of its right to have the witnesses against it produced in person and to be confronted by them at the trial in violation of Section 10, Article 2 of the Constitution of Arkansas and of Article 6 of the Amendments of the Constitution of the United States. (2) It subjects the defendant to unreasonable search and seizure of its books, papers, and documents and calls upon it to produce evidence against itself in a penal action, while the plaintiff in this cause and defendants in other causes are not subjected to such requirements, and thereby violates the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States, and Sections 8, 10 and 15 of Article 2, of the Constitution of Arkansas.

8. The defendant was ordered to produce the books, papers and documents relating to any defense it has to the action. This was unreasonable and unjust, and denied to the defendants its right to protect its property and the equal protection of the law to which it was entitled under Sections 3, 15 and 21, of Article 2, of the Constitution of Arkansas, and under the Fourteenth Amendment to the Constitution of the United States.

9. The defendant could not be required to obey the order made as a condition to being heard in its defense, and the court cannot
70 deny it the right to be heard as a punishment for such disobedience. But such an order would deny to defendant its right to protect its property and to have justice freely and without purchase, completely and without denial and would deprive the defendant of its property without due process of law, and would deny to it the equal protection of the laws in violation of sections 2, 8, 13 and 21 of Article 2 of the Constitution of Arkansas, and of the Fourteenth Amendment to the Constitution of the United States.

10. The striking the defendant's pleadings and rendering judgment against it by default, denied to it the equal protection of the laws and deprived it of its property without due process of law, in violation of sections 3, 8 and 21 of Article 2, of the Constitution of Arkansas, and of the Fourteenth Amendment of the Constitution of the United States.

III.

That the allegations of the complaint do not disclose any cause of action against defendant, and a judgment was unauthorized and improper.

IV.

That the court erred in rendering a judgment against it for any money penalty, since it was not permitted to make any defense and since the judgment is for acts done and transactions occurring wholly outside of the State of Arkansas and in other States, and deprives the defendant of its property without due process of law, in violation of sections 8 and 21 of Article 2 of the Constitution of Arkansas and of the Fourteenth Amendment to the Constitution of the United States.

V.

The judgment denies to the defendant the equal protection
71 of the law, in violation of Section 3, Article 2, of the Constitution of Arkansas, and of the Fourteenth Amendment to the Constitution of the United States.

VI.

The judgment deprives the defendant of the right to do business in the State of Arkansas, which it acquired by complying with the laws of the State with respect to the admission of foreign corporations to do business therein, in violation of section 17, article 2 of the constitution of Arkansas, and Section 10 Article 1 of the Constitution of the United States.

Respectfully submitted,

ROSE, HEMINGWAY, CANTRELL & LOUGHBOROUGH,
Attorneys for Defendant.

(Endorsed:) Filed October 27th, 1906. P. H. Carnes, Clerk, By R. B. Brodie, D. C.

72 NOVEMBER 1ST, 1906.

1691.

STATE OF ARKANSAS *ex Rel.* ROBERT L. ROGERS, Attorney General, Plaintiff,
vs.
HAMMOND PACKING COMPANY, Defendant.

Order bill of exceptions signed. Comes the defendant by its attorneys and presents to the court a bill of exceptions in this cause, and upon examination thereof the same is by the court allowed, signed and ordered filed and made part of the record in this case.

73 In the Pulaski Circuit Court, Second Division.

STATE OF ARKANSAS
vs.
HAMMOND PACKING COMPANY.

Bill of Exceptions.

Bill of exceptions.

Statement of proceedings.

Be it remembered, That on the 25th day of October, 1906, the same being a day of the regular term of the Pulaski Circuit Court, Second Division, the above entitled cause came on to be heard, on the motion of the plaintiff to strike the pleadings, including the demurrer and answer of the defendant, from the files, and to take judgment by default, and upon the response of the defendant thereto, which said motion and response are in words as follows, to-wit:

(Here Clerk will copy motion and Response on file in the cause.)
For Motion and Response see pages 54–58.

Plaintiff's motion to strike out part of response overruled.

And the parties each appearing by their respective attorneys of record, the plaintiff moved to strike out each of paragraphs 1, 2, 3, 4, and 5, of said response, on the ground that they present questions already presented to and determined by the court, but the court overruled said motion and the plaintiff excepted.

The plaintiff then offered in support of its motion, the motion for an order of examination and for the appointment of a commissioner together with the affidavit of Robert L. Rogers, filed in connection therewith; the order of the court entered thereon on the 10th day of September, 1906, appointing Lyle D. Taylor, commissioner to take depositions of the parties named, at his office Room 1301 Ashland Block, 59 Clark Street, in the city of Chicago, Illinois, on the 20th day of September, 1906, at ten A. M. the commission issued
74 to said Lyle D. Taylor and his return thereon, which motion, affidavit, order of court, commission and return are in words and figures as follows, to-wit:

(Here Clerk will copy the motion for commission, the affidavit of Robert L. Rogers, the order of examination, the commission and the return thereon.)

Motion to appoint Commissioner..... page 17
Affidavit of R. L. Rogers..... 13
Order of Examination or appointing the Commissioner..... 24
Commission & Return..... 79.

75 And the defendant in support of its response, offered in evidence its motion filed in this cause on the 8th day of March, 1906, for rule on the plaintiff to make the allegations of its complaint more definite and certain, which is in words as follows, to-wit:

(Here Clerk will copy motion among the papers in the case endorsed "Filed March 8, 1906.")

For motion see page 16.

And also introduced the order of the court overruling said motion, which was made on the 10th day of September, 1906, and prior to the making of the order for the appointment of Lyle D. Taylor, Commissioner, and is in words as follows, to-wit:

(Here Clerk will copy from record the order entered September 10, 1906.)

For order above referred to see page 24.

And also introduced in support of its response its motion for an order to require all depositions to be taken out of Pulaski County for use in this cause to be taken upon interrogatories, which was filed June 27th, 1906, and is in words as follows, to-wit:

For motion see page 14.

And the order of the court overruling said motion, which order was made on September 10, 1906, prior to the making of the order appointing Lyle D. Taylor, Commissioner to take depositions hereinbefore set out.

For order see page 23.

Defendant also introduced in support of its response its motion filed September 8, 1906, for an order on plaintiff to designate in its motion for the appointment of a commissioner to take depositions, the names of the persons to be examined, and what plaintiff expected to prove by each of them, and also to set out specifically a
76 particular description of any books, papers and documents that it desired produced with the name of the witness who was expected to produce them, and to show that they were material to the issues in the case, which motion is in words as follows, to-wit:

For motion see page 20.

And further introduced the order overruling said motion, which was made by the court on September 10, 1906, prior to the order appointing Lyle D. Taylor, Commissioner, hereinbefore set out.

For order above mentioned see page 23.

Motion to strike defendant's pleadings sustained.

And the court having heard the argument of counsel, and being fully advised in the premises, sustained the motion and struck the demurrer and answer of the defendant to the complaint of plaintiff from the files, to which action of the court in striking its demurrer and in striking its answer defendant at the time saved its several exceptions, which demurrer and answer so stricken from the files are in words and figures as follows, to-wit:

For demurrer above referred to see page 48.

For answer above referred to see page 36.

Money judgment rendered by default.

And thereupon the court on motion of the plaintiff ordered that a money judgment be rendered against defendant by default, to which defendant then and there excepted, the plaintiff then introduced the stipulation of the parties with respect to the penalty to be assessed, which is in words and figures as follows:

For stipulation above referred to see page 51.

Penalty. And according to said stipulation of the parties the assessment of the penalty was waived and a penalty of $10,000.00 assessed on the first paragraph of the complaint in full of all demands in the suit, and to the action of
77 the court in rendering judgment against it by default, or for any money penalty, the defendant at the time saved its several exceptions.

And thereupon the defendant filed its motion to set aside the judgment and for a new trial, in words and figures as follows, to-wit:

For motion above referred to see page 67.

Motion for new trial overruled. And the court overruled said motion, to which action the defendant at the time saved its exceptions, and asked leave to file its bill of exceptions within twenty days from this date, which leave was granted by the Court; and thereupon the defendant prayed an Appeal granted. appeal to the Supreme Court of Arkansas, which was granted; and now on this 1st day of November, 1906, within the time allowed by the court for the filing bill of exceptions, comes the defendant and tenders this its bill of exceptions, which having been examined by the undersigned and found in all things correct is approved, Bill of exceptions signed &c. signed and sealed by the undersigned judge of the court, and ordered to be filed as a part of the record in this cause.

E. W. WINFIELD, *Judge.*

(Endorsed:) Filed November 1st, 1906. P. H. Carnes, Clerk. By R. B. Brodie, D. C.

78 In the Pulaski Circuit Court, Second Division.

No. 1691.

STATE OF ARKANSAS *ex Rel.* ROB'T L. ROGERS, Attorney General, Plaintiff,

vs.

HAMMOND PACKING COMP'Y Defendant.

Commission to Take Depositions.

The People of the State of Arkansas to Lyle D. Taylor, of Chicago, Illinois, Greeting:

Commission to Lyle D. Taylor. Know ye, That we, with full faith and confidence in your prudence and competency, have appointed you Commissioner, and by these presents do authorize you to examine S. A. McLean, Jr., Arthur Meeker, L. A. Carton, K. K. McLaren, Edward Tilden, Arthur Colby, J. Ogden Armour, P. A. Valentine, Louis P. Swift, Edward F. Swift, Edward Morris, Ira N. Morris, Jesse P. Lyman, Jas. D. Standish, Thomas J. Connors, Thos. E. Wilson, or such of them as

may be produced before you as witnesses in the action mentioned in the caption hereto, now pending in our Circuit Court, for Pulaski County, Arkansas, in the second division thereof, wherein the State of Arkansas, *ex rel.* Robert L. Rogers, Attorney General, is the plaintiff and The Hammond Packing Company is defendant, upon the part of the plaintiff, orally upon oath; and we do further authorize and direct you that such examination of said persons or such of them as may be produced before you shall be upon oral questions, to be put to said witnesses or persons by or on behalf of either of the parties in the aforementioned suits, and that you take and certify the depositions of said persons (torn from original) and return the same in accordance with the directions contained in the order of Court hereto attached, and to do all other acts authorized in said order; and that you return this Commission with the testimony of said persons taken as aforesaid attached thereto by mail to Patrick H. Carnes, Clerk of the Circuit Court of Pulaski County, Ar-
79 kansas, at Little Rock, Arkansas.

Witness the signature of the Honorable E. W. Winfield, Judge of the Second Division of our Circuit Court of Pulaski County, Arkansas, at the County Court House of said County in the city of Little Rock, Arkansas, this 10th day of September, 1906.

E. W. WINFIELD,
Judge of the Second Division of the Circuit Court of Pulaski County, Arkansas.

And witness further the hand of Patrick H. Carnes, the Clerk of the Circuit Court of Pulaski County, Arkansas, and of the Second Division thereof, and the seal of said Court, affixed at the County Court House of said County, in the City of Little Rock, Arkansas, on the 10th day of September, 1906.

[SEAL.] P. H. CARNES,
Clerk of the Circuit Court of Pulaski County, Arkansas, and of the Second Division Thereof.

80 In the Circuit Court of Pulaski County, Second Division.

STATE OF ARKANSAS, *County of Pulaski:*

Be it remembered, That at a regular term of the Circuit Court of Pulaski County, Arkansas, in the Second Division thereof, begun and held at the Court House in the city of Little Rock, in said County, on Monday, the 5th day of March, 1906, and thereafter on the 10th day of September, 1906, a day of said term, the Honorable Edward W. Winfield, Judge of said Court presiding, the following proceedings were had in said Court, to-wit:

No. 1691.

STATE OF ARKANSAS *ex Rel.* ROBERT L. ROGERS, Attorney General, Plaintiff,

vs.

HAMMOND PACKING COMPANY, Defendant.

Certified copy of order appointing commissioner to take depositions.

Come the parties by their attorneys, and the motion herein filed by the plaintiff for the appointment of a Commissioner to take the depositions of certain witnesses therein named, in the State of Illinois, orally and the motion herein filed by the defendant that all depositions in this cause to be taken outside of the county of Pulaski be taken upon written interrogatories, and the motion of the defendant that the aforesaid motion of the plaintiff be made more specific, coming on to be heard, and the court being well and sufficiently advised of the matters arising thereon, doth consider that the prayer of the aforesaid motion of the plaintiff be granted, and it is so ordered; and the court doth further consider that the prayer of the aforesaid motions of the defendant be denied, and it is so ordered.

It is therefore ordered by the court, That a commission issue in the cause above named, directed to Lyle D. Taylor, 1301 Ashland Block, 59 Clark Street, in the city of Chicago, Illinois, for the taking of the testimony of S. A. McLean, Jr., Arthur Meeker, L. A.
81 Carton, K. K. McLaren, Edward Tilden, Arthur Colby, J. Ogden Armour, P. A. Valentine, Louis F. Swift, Edward F. Swift, Edward Morris, Ira N. Morris, Jesse P. Lyman, James D. Standish, Thomas J. Connors and Thomas W. Wilson, and for the production of any books, papers and documents in the possession or under the control of either of said persons, relating to the merits of said cause, or to any defense therein, and directing and empowering said commissioner to examine orally under oath, each and all of said persons or such thereof, as may be brought before him for examination *provided*, that, at such examination the witnesses and books aforesaid shall not be required to be produced, at any one time, in such numbers as to interfere with the operation of the defendant's business.

It is further ordered, that said commissioner shall immediately upon receipt of his commission above granted, issue notice in writing, directed to the President, or some officer or agent of the defendant corporation or to the attorney or attorneys of record of said defendant, notifying such president, officer, agent or attorney that the testimony of the persons above named is desired and requesting such president, officer, agent or attorney to have such persons, together with such books, papers and documents as above referred to, at the office of the said Lyle D. Taylor, 1301 Ashland Block, 59 Clark Street, in the city of Chicago, Illinois, on the 20th day of September, 1906 at 10 o'clock A. M., then and there to testify and to have such persons to attend at said place from day to day or from time to time, if adjournments be had, until the taking of their testimony herein

be completed, and at such times to produce said books, papers and documents whenever demanded.

And it is further ordered that Counsel for the respective parties or either of them, be, and they are hereby authorized and allowed to attend before said commissioner upon the execution of the commissioner hereinbefore granted, and to orally examine and cross-examine said witnesses or either of them; such oral examination and
82 cro-s-examination to be reduced to writing or type by the Commissioner, signed by said witnesses, attested in due form of law and annexed to and returned with the Commission hereinbefore ordered, to the Clerk of the Pulaski Circuit Court.

The defendant at the time saved its exceptions to the action of the court in granting the above order and in overruling of each paragraph of the aforesaid motion of the defendant, to require said depositions to be taken on written interrogatories, and to the overruling of the motion to make plaintiff set up the materiality of the witnesses and books, and to describe the latter, and also particularly and severally to so much of said order as directed the defendant to produce witnesses, books, papers and documents, or either witnesses, books, papers or documents before the Commissioner above named, and asked that said exceptions be noted of record.

STATE OF ARKANSAS, *County of Pulaski, ss:*

I, P. H. Carnes, Clerk of the Circuit Court within and for the County aforesaid, and of the Second Division thereof, do hereby certify that the foregoing and preceding pages of typewritten matter contains a true and perfect copy of the order of said Court appointing a Commissioner to take orally depositions of witnesses in the State of Illinois, to be read in evidence in the case pending in said Court, wherein the State of Arkansas, *ex rel.* Rob't L. Rogers, is plaintiff, and Hammond Packing Co., is defendant, as the same appears of record in my office.

In witness whereof, I hereunto set my hand and affix the seal of said Court this 10th day of September, 1906.

[SEAL.] P. H. CARNES, *Clerk.*

83 STATE OF ARKANSAS *ex Rel.* ROB'T L. ROGERS, Attorney General, Plaintiff,

vs.

HAMMOND PACKING COMPANY, Defendant.

Proceedings before Commissioner.

Proceedings had before Lyle D. Taylor, Commissioner under and in pursuance of the attached Commission, at Room 1301 Ashland Block, 59 Clark Street, in the City of Chicago and State of Illinois, on the dates respectively following:

September 12, 1906. On this day the Commissioner doth receive the commission from the Pulaski Circuit Court, hereto attached, for the taking of the depositions of S. A. McLean, Jr., Arthur Meeker, L. A. Carton, K. K. McLaren, Edward Tilden, Arthur Colby, J.

Ogden Armour, P. A. Valentine, Louis F. Swift, Edward F. Swift, Edward Morris, Ira N. Morris, Jesse P. Lyman, Jas. D. Standish, Thomas J. Connors, Thos. E. Wilson in this cause; and on the same day in pursuance thereof the Commissioner doth issue the notice hereto attached and marked Exhibit A; and the Commissioner doth this day personally serve upon Edward Tilden, the President of the Hammond Packing Company, the aforesaid notice, as shown by the return thereto attached; and on the same day the Commissioner doth issue in said cause the notice thereto attached marked Exhibit B directed to Rose, Hemingway, Cantrell & Loughborough, Attorneys of Record of the Hammond Packing Co. and doth forward the same for service at Little Rock, Arkansas, to the Sheriff of Pulaski County, Arkansas.

Notice to Edward Tilden issued and served.

Notice issued to attorneys for defendant.

September 20th, 1906, 10 o'clock A. M. On this day the aforesaid notice hereto attached and marked Exhibit B, together with the certificate of service thereof from C. C. Kavanaugh, Sheriff of Pulaski County, Arkansas, is filed with the Commissioner.

Notice served, &c.

And on this day the taking of depositions in this cause coming on in pursuance to the commission hereto attached, comes the plaintiff, the State of Arkansas, by her Attorney General, Robert L. Rogers, and comes the defendant the Hammond Packing Company, by W. E. Hemingway, its Attorney and it is agreed that the taking of depositions in this cause be adjourned until September 27th, 1906, at 10 o'clock A. M., at this place.

Taking of depositions postponed by consent.

September 27th, 1906 at 10 o'clock A. M. On this day the taking of depositions in this cause coming on in pursuance to the Commission hereto attached, and the agreement of the parties hereinbefore had upon September 20th, 1906, comes the State of Arkansas, by her Attorney General, Robert L. Rogers, and comes the defendant by its Attorney, W. E. Hemingway, and by consent the taking of depositions in this cause is continued until Monday, October 1st, 1906, at 10 o'clock A. M., at this place.

Further postponed by consent.

October 1st, 1906, 10 o'clock A. M. On this day the taking of depositions in this cause coming on in pursuance to the Commission hereto attached, comes the plaintiff, the State of Arkansas, by her Attorney General, Robert L. Rogers, and comes the defendant, the Hammond Packing Company by W. E. Hemingway, its Attorney, and it is agreed that the taking of depositions in this cause be adjourned until October 2nd, 1906, at 10 o'clock A. M. at this place.

Further postponed by consent.

October 2nd, 1906, 10 o'clock A. M. The taking of depositions in this cause being opened at 10 o'clock A. M., on this day, pursuant to adjournment, come the parties by their respective Counsel, the plaintiff appearing by Robert L. Rogers, her Attorney General, and D. E. Bradshaw appearing for Lewis Rhoton, Prosecuting Attorney

of the Sixth Judicial District of Arkansas and by James H. Stevenson, and the defendant by W. E. Hemingway, its Attorney; and the Commissioner at the request of the plaintiff, calls for the production for examination of J. Ogden Armour, and the other witnesses named in the Commission in this cause, and said witnesses fail to appear and testify, or produce any books, papers and documents, and the defendant fails to produce said witnesses, books, papers and documents as shown by letter hereto attached and marked Exhibit C.

Commissioner calls for J. Ogden Armour & other witnesses.

It is stipulated by and between the parties that the taking
85 of depositions has been from time to time continued by consent, and that all objections on account thereof are waived.

STATE OF ILLINOIS, *County of Cook*, ss:

In the City of Chicago, Office of Lyle D. Taylor, Commissioner, Room 1301 Ashland Block, 59 Clark Street.

Certificate.

I, Lyle D. Taylor, Commissioner appointed and empowered under the attached Commission from the Pulaski Circuit Court, in this cause, duly qualified and acting as such Commissioner, do hereby certify that the foregoing four pages contain and are a full, true and complete record of the proceedings had before me, as such Commissioner in this cause.

Witness my hand as such Commissioner this 3rd day of October, A. D. 1906.

LYLE D. TAYLOR,
Commissioner.

86 In Pulaski Circuit Court, Second Division.

In the matter of

STATE OF ARKANSAS *ex Rel.* ROBERT L. ROGERS, Att'y Gen'l, Plaintiff,
vs.
HAMMOND PACKING COMPANY, Defendant.

Notice.

To Edward Tilden, President of the aforesaid defendant:

You are hereby notified, that, in a suit now pending in the Circuit Court of Pulaski County, Arkansas, in the Second Division thereof, wherein the State of Arkansas, *ex rel.* Robert L. Rogers, Attorney General, is the plaintiff, and Hammond Packing Company is the defendant, in pursuance of Section Eight of the Act of the General Assembly of

Exhibit A.

the State of Arkansas, approved January 23rd, 1905, and entitled "An Act Providing for the punishment of Pools, Trusts, Conspiracies to Control Prices, and as to Evidence and Prosecution in such cases" etc. the said Circuit Court of said County has issued a commission, directed to the undersigned, for the taking of the testimony of S. A. McLean, Jr., Edward Tilden, Arthur Colby, J. Ogden Armour, P. A. Valentine, Louis F. Swift, Edward F. Swift, Edward Morris, Ira N. Morris, Jesse P. Lyman, James D. Standish, Thos. J. Connors, Thomas E. Wilson, Arthur Meeker, L. A. Carton, amd K. K. McLaren, and for the production of any books, papers and documents in the possession of either of said persons relating to the merits of said cause, or any defense therein, at the office of the undersigned, at Room 1301, Ashland Block, No. 59 Clark Street, in the City of Chicago, Illinois, on the 20th day of September, 1906, at ten o'clock A. M.

You are therefore hereby notified that the testimony of the above named persons is desired in said cause. You are accordingly requested to have said persons, together with such books, papers and documents, before me, at the time and place above mentioned, then and there to testify.

Given under my hand as Commissioner under the appointment aforesaid, this 12th day of September, 1906.

LYLE D. TAYLOR,
Commissioner.

"Exhibit A." Lyle D. Taylor, Commissioner.

STATE OF ILLINOIS, *County of Cook, City of Chicago:*

I, Lyle D. Taylor, do solemnly swear, that I am a person of full age and that I have this day, September 13, 1906, served the above notice upon Edward Tilden, the President of Hammond Packing Co., by exhibiting to him the original and stating to him the contents thereof, and also by delivering to him a copy thereof.

LYLE D. TAYLOR.

Sworn to and subscribed before me this 17th day of September, 1906.

J. L. BENNETT,
Notary Public.

In the Pulaski Circuit Court, Second Division.

In the matter of

STATE OF ARKANSAS *ex Rel.* ROBERT L. ROGERS, Att'y Gen'l, Plaintiff,

vs.

HAMMOND PACKING COMPANY, Defendant.

Notice.

To Rose, Hemingway, Cantrell & Loughborough, Attorneys:

You are hereby notified, That in a suit now pending in the Circuit Court of Pulaski County, Arkansas, in the Second Division thereof, wherein the State of

Exhibit B.

Arkansas, *ex rel.* Robert L. Rogers, Attorney General, is the plainti
and The Hammond Packing Company, is the defendant, in purs
ance to Section Eight, of the Act of the General Assembly of t
State of Arkansas, approved January 23rd, 1905, and entitled "A
Act Providing for the punishment of Pools, Trusts, Conspiracies,
Control Prices and as to Evidence and Prosecution in such case
etc. the said Circuit Court of said County has issued a commissi
directed to the undersigned for the taking of the testimony of S.
McLean, Jr., Edward Tilden, Arthur Colby, J. Ogden Armour, P.
Valentine, Louis F. Swift, Edward F. Swift, Edward Morris, Ira
Morris, Jesse P. Lyman, James D. Standish, Thos. J. Conn
Thomas E. Wilson, Arthur Meeker, L. A. Carton, and K. K.
Laren, and for the production of any books, papers, and docume
in the possession of either of said persons, relating to the merit
said cause, or any defense therein, at the office of the undersig
at Room 1301, Ashland Block, No. 59 Clark Street, in the City
Chicago, Illinois, on the 20th day of September, 1906, at ten o'cl
A. M.

You are therefore hereby notified that the testimony of
90 above named persons is desired in said cause. You are
cordingly requested to have said persons together with s
books, papers, and documents, before me, at the time and place ab
mentioned, then and there to testify.

Given under my hand as Commissioner under the appointm
aforesaid, this 12th day of September, 1906.

LYLE D. TAYLOR,
Commissione

Exhibit B. Lyle D. Taylor, Commissioner.

91 STATE OF ARKANSAS, *County of Pulaski, ss:*

I hereby certify that I have this day served the above atta
notice upon Rose, Hemingway, Cantrell & Loughborough, by s
ing the original thereof to D. H. Cantrell, a member of said
and stating its substance to him, and delivering to him a
thereof, this 14th day of September, 1906.

C. C. KAVANAUGH, *She*
By SOL. WORMSER, *D. S.*

(Endorsed:) Filed Sept. 20th, 1906. Lyle D. Taylor, Co
sioner.

92 Lyle D. Taylor, Commissioner, Ashland Block, City.

Exhibit C. DEAR SIR: Your request upon this comp
produce certain of its officers and employees
books, papers and documents, before you, to be used as eviden
the part of the plaintiff in the case of the State of Arkansas a
this Company, has received the most respectful consideration.
Company cannot concede the right of the Honorable Court
commission you bear, to make the order under which you
your right to make the request referred to. On the contrary,

opinion that the request calls upon it to surrender rights in which it is protected by the Constitution of the United States and of the State of Arkansas, that are too valuable to be surrendered.

With all respect for yourself and the Honorable Court, the Company must decline to comply with the request.

ROSE, HEMINGWAY, CANTRELL & LOUGHBOROUGH,
Attorneys for Hammond Packing Co.

Chicago, Oct. 2, 1906.

Exhibit C. Lyle D. Taylor, Commissioner.

(The foregoing Commission and return is endorsed as follows:) "Returned and filed this 5th day of Oct. 1906. P. H. Carnes, Clerk, by R. B. Brodie, D. C.

93 *Certificate.*

STATE OF ARKANSAS, *County of Pulaski, ss:*

I, P. H. Carnes, Clerk of the Circuit Court, within and for the County aforesaid, do hereby certify that the foregoing is a true and perfect transcript of the pleadings and record in said Court in the case of State of Arkansas *vs.* Hammond Packing Company, as the same appear on file and of record in my office.

In testimony whereof, I have hereunto set my hand and the seal of said Court this 6th day of November, 1906.

[SEAL.]

P. H. CARNES,
Clerk of the Circuit Court.
By L. J. GIBSON, *D. C.*

Fee Bill.

P. H. Carnes, Clerk ($2.50 paid by Pl'ff)	$17.00
P. H. Carnes, Clerk (this transcript)	34.25
C. C. Kavanaugh, Sheriff	2.40
Lyle D. Taylor, N. P.	50.00

94 No. 1159.

HAMMOND PACKING COMPANY
vs.
THE STATE OF ARKANSAS *ex Rel.* ROB'T L. ROGERS, Attorney General.

Transcript.

Filed November 15, 1906.

P. D. ENGLISH, *Clerk,*
By J. H. CAMPBELL, *D. C.*

95 STATE OF ARKANSAS, *ss:*

In the Supreme Court.

Be it remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held on the 28th day being the fourth Monday of May, A. D. 1906, at the Courthouse, in the City of Little Rock, the following proceedings were had, to-wit: On the 12th day of November, 1906, a day of said term:

HAMMOND PACKING COMPANY, Appellant,
vs.
THE STATE OF ARKANSAS, Appellee.

Appeal from Pulaski Circuit Court.

On motion and by consent of parties, and it appearing that this appeal involves a question of public interest, this cause is advanced on the calendar, and set for submission on December 10th prox.

96 STATE OF ARKANSAS, *ss:*

In the Supreme Court.

Be it remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held on the 28th day, being the fourth Monday of May, A. D. 1906, at the Courthouse, in the City of Little Rock, the following proceedings were had, to-wit: On the 19th day of November, 1906, a day of said term:

HAMMOND PACKING COMPANY, Appellant,
vs.
THE STATE OF ARKANSAS, Appellee.

Appeal from Pulaski Circuit Court.

The order heretofore made setting this cause, having, by inadvertence, been made prior to the filing of the transcript, the said order is now by the Court annulled and vacated.

Cause set for Submission.

And the said transcript having been filed, this cause is now, pursuant to the statute in such cases made and provided, advanced on the calendar, and set for submission on December 17th, 1906.

97 STATE OF ARKANSAS, *ss:*

In the Supreme Court.

Be it remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held on the 26th day, being the fourth Monday of November, A. D. 1906, at the Courthouse, in the City of Little Rock, the following proceedings were had, to-wit: On the 3rd day of December, 1906, a day of said term:

HAMMOND PACKING COMPANY, Appellant,
vs.
THE STATE OF ARKANSAS, Appellee.

Appeal from Pulaski Circuit Court.

On motion this cause is passed and reset for December 31st, 1906, with leave to argue the same orally.

98 STATE OF ARKANSAS, *ss:*

In the Supreme Court.

Be it remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held on the 26th day, being the fourth Monday of November, A. D. 1906, at the Courthouse, in the City of Little Rock, the following proceedings were had, to-wit: On the 31st day of December, 1906, a day of said term:

HAMMOND PACKING COMPANY, Appellant,
vs.
STATE OF ARKANSAS, Appellee.

Appeal from Pulaski Circuit Court.

Submission. This cause being regularly called, come the parties thereto by their respective attorneys, and said cause is submitted to the court upon the transcript of the record, the briefs filed, and upon oral argument of attorneys and is by the Court taken under advisement.

99 STATE OF ARKANSAS, *ss:*

In the Supreme Court.

Be it remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held on the 26th day, being the fourth Monday of November, A. D. 1906, at the Courthouse, in the City of Little Rock, the following proceedings were had, to-wit: On the 14th day of January, 1907, a day of said term:

HAMMOND PACKING COMPANY, Appellant,
vs.
STATE OF ARKANSAS, Appellee.

Appeal from Pulaski Circuit Court, 2nd Division.

This cause came on to be heard upon the transcript of the record of the Circuit Court of Pulaski County, Second Division, and was argued by counsel, on consideration whereof it is the opinion of the Court that there is no error in the proceedings and judgment of said Circuit Court in this cause.

Judgment. It is therefore considered by the Court that the judgment of said Circuit Court in this cause rendered be and the same is hereby in all things affirmed with costs.

It is further considered that said appellee recover of said appellant all her costs in this court in this cause expended and have execution thereof.

Battle J. dissents.

Wood J. concurs in the judgment.

100 No. 97.

In the Supreme Court of Arkansas, January 14, 1907.

HAMMOND PACKING COMPANY
v.
STATE OF ARKANSAS.

Opinion.

HILL, *C. J.:*

This is an action brought by the State of Arkansas on the relation of the Attorney General against the Hammond Packing Company alleging that it was doing business in the State contrary to the Anti Trust Act of 1905. After answer a commission was issued to a commissioner in Chicago to take testimony. Upon a refusal to comply with the order of court requiring production of witnesses and documents, after notice, the answer was stricken out, and judgment rendered against the appellant as by default, and it appealed.

(The Reporter will state the substance of the pleadings, and of the proceedings and set forth the order in question, the declination of the appellant and Sections 8 and 9 of the Act.)

1. The nature of the "conspiracy to defraud" denounced by section 1 of the Act of January 23, 1905, the Anti Trust Act is the first subject requiring attention. Appellant contends that the complaint, framed in the language of that section, does not constitute a cause of action because the acts therein complained of constitute a crime and under Art. 2, sec. 8 of the Constitution of Arkansas "No person shall be held to answer a criminal charge unless on presentment or indictment of a grand jury," (with certain exceptions not pertinent to this issue.)

The same contention was made in regard to the offense described in the 1st section of the Anti Trust Act of 1899. The difference between section 1 of the Act of 1899 and section 1 of this Act is immaterial on this issue. The court in construing the Act of 1899 in State *v.* Lancashire Ins. Co. 66 Ark. 466; ruled this point, it is true *sub silentio,* against the contention of the appellant. That an attempted monopoly, an agreement to restrain the freedom of trade, was a criminal conspiracy at common law is undoubt-
101 edly true. This subject is fully discussed and also the applicability of the law of criminal conspiracy to modern combina-

tions in restraint of trade in Eddy on Combinations, secs. 335-363 and Beach on Monopolies, secs. 77-87.

When the ingredients constituting the criminal conspiracy at common law and the ingredients constituting the "conspiracy to defraud" under Anti Trust Acts are examined it is apparent that the offenses are not identical.

The latter is doing business while a member of an illegal combination while the former is a conspiracy to do an unlawful act or a conspiracy to do a lawful act in an unlawful manner. The remedies against the common law conspiracy were indictment for the criminal conspiracy and an action on the case for damages by an aggrieved party or *quo warranto* by the State against an offending corporation. Eddy on Combinations, secs. 338, 371.

This action is entirely different and is purely a statutory action to recover the penalties of the statute for doing business in the State contrary to its terms. These penalties are two fold, one a money judgment for each day the offense continues and the other as to corporations a forfeiture of charter if a domestic corporation and forfeiture of right in the State if a foreign corporation. (Anti Trust Act, 1905, secs. 2 and 3.)

Railway *v.* State, 56 Ark. 166 is applicable here. It was therein demonstrated that a statutory penalty for a matter not a crime at common law and not made a crime by the statute was recoverable in a civil action and was not a "criminal charge" within the meaning of sec. 8 Art. 2 of the Constitution.

The fact that there is a further penalty in case the offender is a corporation,—that penalty being the civil death of the corporation if it is created by this State and its exile if created by another State—cannot change the effect of the money penalty. It is just an added penalty where the offender is an artificial person and falls equally to the extent of the State's power on foreign and domestic
102 corporations.

It is sought to distinguish the Hartford case, 76 Ark. 303, from this one on the ground that in the Hartford case only the ouster of a foreign insurance corporation was considered while this case presents an appeal from a money judgment only. The matter of money judgment in the Hartford case was covered by an agreement of parties, see page 305, and the decision was limited to the facts presented, but it was expressly held that the corporation had subjected itself to the penalty of the act. That this judgment is not of ouster as well as for the money penalty is not a cause of complaint by appellant, for it is liable to that penalty likewise if liable for the money penalty. Therefore the court treats the action as purely a statutory one for the recovery of the penalty named in the statute.

2. It is contended that secs. 8 and 9 of the Anti Trust Act of 1905 subject defendants proceeded against under them to unreasonable search and seizure of papers, books and documents, contrary to the 4th Amendment of the Constitution of the United States and contrary to a similar provision in sec. 15 Art. 2 Constitution of Arkansas.

The first ten amendments of the Constitution of the United States operate on the Federal Government only and cannot be invoked against State legislation. Jack *v.* Kansas, 199 U. S. 372; Brown *v.* New Jersey, 175 U. S. 172.

Where, however, the provisions of a State constitution are identical with provisions in these amendments the courts of the States, should, and do, regard as controlling decisions of the Supreme Court of the United States upon them.

Appellant relies upon Boyd *v.* U. S. 116 U. S. 616 as establishing the principles that the "search and seizure" clause reaches to an order of court under a statute providing for a production of books and papers under penalty that the complaint be confessed in an
103 action to recover a penalty; and if such order affects an unreasonable search it is contrary to such provision; and actions seeking penalties should in this respect be treated as criminal cases.

The scope of Boyd *v.* U. S. is narrowed when applied to corporations by the recent decision in Hale *v.* Hinkle, 201 U. S. 43, and the case at bar must be determined in these respects by the last enunciation of the court on this subject. It is established in Hale *v.* Hinkle that the interdiction of the 5th Amendment to the Federal Constitution that "no person * * * shall be compelled in any criminal case to be a witness against himself" does not apply to corporations but to natural persons. The exact language above quoted is also found in sec. 8 Art. 2 Constitution of Arkansas. It is further settled by Hale *v.* Hinkle that a corporation is entitled to immunity by reason of the 4th Amendment from unreasonable search.

As to whether the order in question was an unreasonable search of appellant's books is not properly before the court under the facts. The order for the production of the books was coupled with an order to produce named witnesses for oral examination, and J. Ogden Armour, one of those named in the order was the first witness called for oral examination, instead of producing him or showing inability to do so the appellant declined in toto to obey the order.

If appellant had obeyed so much of the order as required the production of witnesses for oral examination or showed its inability to do so and showed an attempt to comply with the order to that extent and had refused to have obeyed the order as to the production of books and papers then the question would be squarely for determination whether the order in question amounted to an unreasonable search of books and papers. It is pointed out in Hale *v.* Hinkle that a *subpœna duces tecum* which practically called for all the books, papers and documents of a large business to be brought into court under a sweeping clause was unreasonable and void, but the fact that it was void as to the production of the books and papers did not justify its disobedience as to appearing to testify. In this case the order is very broad, but its harshness is somewhat
104 ameliorated by a proviso that at the examination the witnesses and books should not be required to be produced at any one time in such numbers as to interfere with the business of the defendant. But, as indicated, it would be *obiter dictum* to determine the reasonableness of the order in question in so far as production of

books and papers is concerned. Sufficient to say that the statute is valid under the decision in Hale *v.* Hinkle in so far as it authorizes a reasonable order for the production of books, papers and documents of a corporation over which the State has control and what may be a reasonable order must be determined in each case as it arises.

Foreign corporations doing business in this State under laws permitting them to do — would in this respect be subject to like State control as domestic corporations. Woodson *v.* State, 69 Ark. 521; Ry. *v.* Gill, 54 Ark. 101; S. C. 156 U. S. 649. The control of the Government over State corporations engaged in interstate commerce surely cannot be as far reaching as the control of a State over a foreign corporation within its borders by its permission and corporations created by it; and as Hale *v.* Hinkle sustains the right of the Government to require a production of books, papers and documents in order for the Government to ascertain in a proper action whether a corporation engaged in interstate commerce is proceeding in its business along legal lines provided such order is reasonable in its terms, it follows, *a fortiori,* that a State may do so over foreign and domestic corporations doing business under authority of its laws.

The question narrows to whether the statute in so far as it authorizes the order to produce witnesses is constitutional. The provisions of section- 8 and 9 are attacked as unreasonable in derogation of natural rights and various clauses of the State and Federal Constitutions. These sections with a few differences immaterial to this issue are copied from the Missouri Anti Trust Act and the clauses under fire here were recently sustained as constitutional by the Supreme Court of Missouri in State *v.* Standard Oil Co. 91 S. W. Rep. 1162.

It is insisted here as it was in Missouri that this statute lays
105 a duty on a corporation to produce its officers and employees or it be defaulted for a failure to do so.

If these provisions mean that the corporation must be a policeman and bring into court on demand its president, bookkeeper or doorkeeper *vi et armis* certainly it would be an unreasonable imposition. An analysis of the provisions, however, will not justify such construction. These sections evidently mean this and nothing more; that the corporation shall on demand request any given officer agent or employee to be present at the time named for examination as a witness (and in case of production of books and papers that the given officer or agent produce the given papers) and on a failure to comply with these requirements that it be defaulted. Of course this necessarily contemplates an honest effort to produce the testimony called for, when that is made then the statute is complied with, when it is not, as in this case, where the defendant corporation refused to obey any part of the order, then the statute is not complied with, and that brings up the gravest question of the case.

3. Is section 9 authorizing the answer to be stricken out and default judgment rendered when the defendant refuses to obey the order made pursuant to section 8 due process of law? The case most

strongly pressed upon the court to sustain the contention that such action is not due process in Harvey *v.* Elliott, 167 U. S. 409.

The Supreme Court of the District of Columbia sitting as a chancery court made an order on defendants to pay over certain funds which had been paid them by a receiver of the court. This order was disobeyed and after citation to show cause against it the answer of defendants was stricken from the files and thereafter the bill was taken *pro confesso* and judgment rendered accordingly. Subsequently suit was brought on the judgment in New York and the case reached the Supreme Court of the United States on the question whether this was due process of law.

Mr. Justice White for the court learnedly and exhaustively reviewed the authorities as to the power of a chancery court to punish for contempt by striking out the answer and proceeding on the
106 bill as confessed and demonstrated that such power did not exist. He says that in England no single case is found sustaining it and in America only two, Walker *v.* Walker, 82 N. Y. 260 and Pickett *v.* Ferguson, 45 Ark. 177. These two cases are condemned as unsound. It is interesting to note that the court in Pickett *v.* Ferguson simply followed the New York case of Walker *v.* Walker, but Mr. Justice Eakin filed a dissenting opinion and reviewed the authorities on the subject and stated the law as it was done subsequently by Mr. Justice White in this case. The court after reaching the conclusion that the chancery court did not possess the power to disregard an answer which was in all respects sufficient and had been regularly filed, and ignore the proof taken in support of it, then passed to the question whether a judgment thus rendered contrary to law was void for want of jurisdiction and subject to collateral attack. It was determined that the judgment was one substantially without hearing and analogous to a judgment determined upon issues not raised in the pleadings and in the absence of the party. The decision was expressly rested "on the want of power in the courts of the District of Columbia to suppress an answer of parties defendant, and after so doing to render a decree *pro confesso* as in case of default for the want of an answer." In the case at bar the court did not lack power to strike out the answer and proceed as in case of default if it was competent for the State to confer that power upon the court. Hence the question here is not the power or want of power in the court but the power or want of power in the State to enact the statute under review. If the court in Hovey *v.* Elliott had held as did this court in Pickett *v.* Ferguson that the power to strike out the answer and proceed as in case of default was an inherent power of the court and still a judgment rendered under it was taking property without due process of law then Hovey *v.* Elliott would be conclusive of this issue. But the decision was predicated upon the premise that the power exercised was contrary to the law of the land, and the sequence followed that property was taken without due process.

107 In the first judiciary act passed by Congress, in 1789, a statute was enacted giving United States courts in the trial of actions at law the power to require the parties to produce books

and writings in their possession or control which contain evidence pertinent to the issue, in cases and under circumstances where the same might be compelled in chancery and this was the penalty named for a violation of such order:

"If a plaintiff fails to comply with such order, the court may, on motion, give the like judgment for the defendant as in cases of non suit; and if a defendant fails to comply with such order, the court may, on motion, give judgment against him by default." Rev. Stat. sec. 724.

An examination of the Federal Statutes Annotated, 3 Vol. p. 2-5, show- this statute has been constantly applied by many of the ablest jurists who have adorned the Federal Bench for the past 118 years and in none of the many decisions applying it and defining its scope has it been held contrary to due process of law.

The revised statutes of Arkansas, adopted in 1837, gave the power to any court of record to compel a party to a suit pending therein to produce any books, papers and documents in his possession or under his control relating to the merits of such suit or to any defense therein. It was provided as a penalty for failure to obey such order that the court may non-suit him, or strike out any pleas or notice of set off or debar him from any particular defense in relation to such books, papers and documents. Rev. Stat. Ch. 116 sec. 88, 92, now found in Kirby's Digest, secs. 3074-3078. There were similar provisions enacted for courts of chancery to proceed as on confession against a party failing to obey an order to produce books, papers and documents. Kirby's Digest, secs. 3079-3080.

These statutes have been constantly invoked in the courts of this State almost since its admission into the Union and their enforcement not opposed as depriving the recalcitrant party of his property without due process. The section under inquiry does not
108 differ in principle or much in detail from section 724 of the Federal Statutes nor these statutes so long upon the statute books of this State in so far as striking out the answer is concerned.

The industry of counsel for appellee develops the fact that such statutes are common in other States, they may be found referred to in the brief. These considerations are important only as indicating that such statutes have long been accepted by bench and bar, State and Federal, as being part of the law of the land. This question was before the Supreme Court of Mississippi under a statute authorizing a default for a failure to answer interrogations; and the statute was attacked as unconstitutional on the strength of the opinion in Hovey *v.* Elliott.

The court said: "It was a declaration of the Magna Charta that no one should be deprived of a right without being heard in his defense; and this principle is embodied in section 14 of our State Constitution, which provides that 'no person shall be deprived of life, liberty or property, except by due process of law.' However wholesome this doctrine is when applied to courts and to persons exercising judicial or quasi-judicial functions, it has never been supposed that it deprived the legislature of the power of changing the rules of evi-

dence, or of modifying or abrogating altogether the presumptions indulged by the principles of the common law. If the legislature may provide for a discovery of evidence in the hands of the adversary, it must be competent for it to impose upon such party the conditions of a failure to make such discovery; for when the legislature requires the discovery to be made and imposed the conditions of a refusal, such conditions must become the law of the land, and to pursue the statute is due process of law. (Bagg's case, cited in Hovey *v.* Elliott, 167 U. S. 416)" Ills. Cent. R. Co. *v.* Stanford, 75 Miss. 862.

This case is criticised as reasoning in a circle, but the criticism is not just if the statute is valid. Of course an invalid statute gives no force and is not the law of the land and proceedings under
109 it are not pursuant to due process, but where the statute is valid then its provisions become as much the law of the land as any common law inherited from England. The question then passes to whether the State has power to enact a statute visiting the penalty judgment upon a party required to produce evidence in court who fails and refuses to do so. The power of the State in such matters is thus stated by Mr. Justice Brewer speaking for the Federal Supreme Court: "The State has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not make a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution. * * * The State is not tied down by any provision of the Federal Constitution to the practice and procedure which existed at common law. Subject to the limitations heretofore named it may avail itself of the wisdom gathered by the experience of the century to make such changes as may be necessary." Brown *v.* New Jersey, 175 U. S. 172. See also Wilson *v.* N. C. 169 U. S. 586; Hurtado *v.* California, 110 U. S. 516.

In L. & N. Ry. Co. *v.* Schmidt, 177 U. S. 230, Mr. Justice White for the court said, at page 236 "It is no longer open to contention that the due process clause of the 14th Amendment to the Constitution of the United States does not control mere forms of procedure in the State courts or regulate practice therein. All its requirements are complied with, in the proceedings which are claimed not to have been due process of law, provided the person condemned has had sufficient notice and an adequate opportunity afforded him to defend. See also Smith *v.* Croft, 182 U. S. 436.

Applying these principles it cannot be doubted that the statute in question, like 724 of the Rev. Stat. of the United States and 3079, 3080 of Kirby's Digest is a matter of procedure and practice in procuring testimony in trials and enforcing orders for production of material and relevant evidence and in the proceeding leading up to its enforcement it requires sufficient notice and an adequate opportunity to defend, first against the order, secondly it provides
110 for an opportunity, after notice, to obey it, before any default can be taken; and these provisions meet the requirements of the 14th Amendment.

4. Appellant presents arguments against the construction placed on section one of this act in Hartford Ins. Co. v. State, 76 Ark. 303, but the rule of *stare decisis* forbids a re-examination of these questions.

Other matters have been presented and considered but the views expressed heretofore are fatal to appellant's contentions.

Judgment affirmed.

Battle, J. dissents.

111 STATE OF ARKANSAS, *ss:*

In the Supreme Court.

Be it remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held on the 26th day, being the fourth Monday of November, A. D. 1906, at the Courthouse, in the City of Little Rock, the following proceedings were had, to-wit: On the 28th day of January, 1907, a day of said term:

HAMMOND PACKING COMPANY, Appellant,
vs.
THE STATE OF ARKANSAS, Appellee.

Appeal from Pulaski Circuit Court.

On motion the appellant is granted time until February 4th prox. in which to file its petition for rehearing herein.

112 STATE OF ARKANSAS, *ss:*

In the Supreme Court.

Be it remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held on the 26th day, being the fourth Monday of November, A. D. 1906, at the Courthouse, in the City of Little Rock, the following proceedings were had, to-wit: On the 4th day of February, 1907, a day of said term:

HAMMOND PACKING COMPANY, Appellant,
vs.
THE STATE OF ARKANSAS, Appellee.

Appeal from Pulaski Circuit Court.

Comes the appellant by its attorneys, and files its petition for a rehearing.

113 In the Supreme Court of Arkansas.

No. 1159.

HAMMOND PACKING COMPANY, Appellant,
vs.
STATE OF ARKANSAS *ex Rel.* —— ——, Appellee.

Motion for Rehearing.

Comes the appellant, by leave of the court, and files its motion to set aside the judgment rendered against it in this cause on the 14th day of January last, and for cause alleges the following:

I.

That the said judgment in effect holds, although the court did not discuss the question in its opinion, that the provision of the Anti-Trust Act of Arkansas which authorizes the court to make an order on the defendant for the production of books, papers and documents was not unconstitutional and did not violate the Fourteenth Amendment to the Constitution of the United States by subjecting the appellant to an unreasonable search and seizure of its books, papers and documents.

II.

That the judgment in effect holds, although it was not discussed in the opinion of the court that the provision of the Arkansas Anti-Trust Act which authorizes the court to make an order on the appellant for the production by it of witnesses and books, papers and documents and thereby to furnish evidence against itself, was not unconstitutional, and did not violate the Fourteenth Amendment to the Constitution of the United States.

III.

That the judgment in effect holds, although the question
114 was not discussed in the opinion of the Court, that the provisions of the Arkansas Anti-Trust Act which authorize the court to make an order on the appellant for the production of witnesses and books, papers and documents, did not deny to the appellant the equal protection of the laws or constitute a taking of its property without due process of law, and that it did not violate the Fourteenth Amendment to the Constitution of the United States.

IV.

That by the judgment of the court it is adjudged, although not discussed in the opinion, that the prohibitions imposed upon the Federal Government by Amendments Four and Five of the Constitution of the United States against subjecting a person to unreasonable search and seizure of his books, papers and documents, and against requiring a defendant to produce evidence to be used

against himself in a penal action, were not extended by the Fourteenth Amendment as a limitation upon the powers of the State governments.

V.

That it is adjudged that the provisions of the Arkansas Anti-Trust Statute which make it the duty of the court, upon motion of the plaintiff, to strike the pleadings of the defendant and render judgment against it by default, for failure to produce witnesses, books, papers and documents in pursuance of an order entered by the court, as provided in said statute, was not unconstitutional and did not violate the Fourteenth Amendment to the Constitution of the United States, or constitute a denial for taking property without due process of law, or constitute a denial to the defendant of the equal protection of the law.

VI.

That by said judgment it is adjudged, that the provisions
115 of the Arkansas Anti-Trust Act, which authorize the recovery of the money penalty against a corporation doing business in the State, in pursuance of the authority of the State and in violation of none of its laws, on the ground only of the conduct of such corporation wholly outside of the State, and in no way affecting its business done in the State and prior to its admission to do business in the State, does not provide for the taking of property without due process of law, or deny the equal protection of the law; and that the judgment rendered in pursuance of said statute, in this cause did not constitute a taking of the appellant's property without due process of law or a denial of the equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States.

VII.

By said judgment it is adjudged that if the defendant entered into the combination or conspiracy defined in the Act outside of the State of Arkansas, and said combination or conspiracy in no way affected its business done in the State, and although such combination was formed or conspiracy entered into prior to the admission of the appellant to do business in the State, under the Act, the defendant is liable for the money penalty, and that the judgment rendered therefor does not constitute taking property without due process of law, or deny to it the equal protection of the law, or violate the Fourteenth Amendment to the Constitution of the United States.

The appellant respectfully submits to the court that in each of the particulars above set out there is error in the judgment rendered, and that in respect to each of them it should have been adjudged that the provisions of the Arkansas Anti-Trust Act were a violation of the Fourteenth Amendment to the Federal Constitution.

The appellant further respectfully submits that the said judgment is erroneous and should be set aside for the reasons that the judgment appealed from and the Arkansas Anti-Trust Act which
116 authorize it are unconstitutional and void in that they deny to the appellant the equal protection of the laws and deprive

it of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

The reasons upon which we base the contentions above stated are set out fully and in much detail in our briefs filed before the hearing of this cause, and we may ask leave of the court to supplement them in a brief to be filed upon this motion.

Respectfully submitted,

ROSE, HEMINGWAY, CANTRELL & LOUGHBOROUGH.

I hereby certify that I am one of the attorneys for the appellant in the above entitled cause, and that I verily believe that the grounds for a motion for rehearing are well taken.

——— ———.

(Endorsed on Back:) Hammond Packing Company *vs.* State of Arkansas, *ex rel.* Cr. No. 1159. Motion for rehearing. Filed Feb. 4, 1907. P. D. English, Clerk. Served on Atty. Genl.

117 STATE OF ARKANSAS, *ss:*

In the Supreme Court.

Be it remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held on the 26th day, being the fourth Monday of November, A. D. 1906, at the Courthouse, in the City of Little Rock, the following proceedings were had, to-wit: On the 18th day of February, 1907, a day of said term:

HAMMOND PACKING COMPANY, Appellant,
vs.
THE STATE OF ARKANSAS, Appellee.

Appeal from Pulaski Circuit Court.

Being fully advised, the petition for rehearing filed herein is by the Court denied.

118 *Certificate of Transcript.*

THE STATE OF ARKANSAS, *ss:*

In the Supreme Court.

I, P. D. English, Clerk of the Supreme Court of the State of Arkansas, hereby certify that the foregoing 117 pages contain a full, true and complete transcript of the record and proceedings in said Court in the cause therein stated, with all things concerning the same.

In testimony whereof I hereto set my hand as Clerk and affix the seal of said Court, at my office in Little Rock, Arkansas, this 20 day of March, A. D. 1907.

[Seal of the Supreme Court, Arkansas.]

P. D. ENGLISH, *Clerk*,
By W. P. SADLER, *Deputy*.

119 In the Supreme Court of Arkansas.

Cr. 1159.

HAMMOND PACKING COMPANY, Plaintiff in Error,
v.
STATE OF ARKANSAS, *ex Rel.* ROBT. L. ROGERS, Att'y Gen'l, Defendant in Error.

Assignment of Errors.

And now comes the Hammond Packing Company, plaintiff in error, and says, that in the record aforesaid there is manifest error, and it hereby states that the errors therein which it intends to rely on at the hearing are as follows, to wit:

I.

The Supreme Court of Arkansas erred in holding and deciding, that so much of Sections One and Two of the Act of the General Assembly of the State of Arkansas, approved January 23, 1905, and entitled, "An Act providing for the punishment of pools, trusts, and conspiracies to control prices" etc., as provides for the recovery of penalties against foreign corporations on the ground that they are members of or parties to a pool, trust, agreement, combination, confederation or understanding made wholly without the State of Arkansas and in no way affecting their business within said State or put into effect therein, was not repugnant to the Fourteenth Amendment of the Constitution of the United States, and that the judgment of the Pulaski Circuit Court, for such penalty did not deprive the plaintiff in error of its property without due process of law in violation of said Amendment.

II.

The Supreme Court of Arkansas erred in holding and deciding, that so much of Sections One and Two of the Act of the General Assembly of the State of Arkansas, approved January 23, 1905,
120 and entitled, "An Act providing for the punishment of pools, trusts, and conspiracies to control prices" etc., as provides for the recovery of penalties against foreign corporations on the ground that they are members of or parties to a pool, trust, agreement, combination, confederation or understanding made wholly without the State of Arkansas and in no way affecting their business

within said State or put into effect therein, was not repugnant to the Fourteenth Amendment of the Constitution of the United States, and that the judgment of the Pulaski Circuit Court, for such penalty did not deny to the plaintiff the equal protection of the law in violation of said amendment, even though the statute might be invalid and such a judgment might not be recoverable against domestic corporations or against natural persons, all equally within the provisions of said sections as foreign corporations are.

III.

The Supreme Court of Arkansas erred in holding and deciding that the provisions of Section Eight of the said Act of the General Assembly of Arkansas, authorizing the Circuit Court to make an order requiring the plaintiff in error, as defendant in actions brought under said Act, to produce witnesses, and books, papers and documents to be used as evidence against itself and not in any way providing for defraying the expense incident to such production, were not repugnant to the Fourteenth Amendment of the Constitution of the United States, and that the judgment of the Pulaski Circuit Court rendered against the plaintiff in error on account of its failure to comply with the order made under the authority of said Section Eight, did not deprive it of its property without due process of law in violation of said Amendment.

IV.

The Supreme Court of Arkansas erred in holding and deciding, that the provisions of Section Eight of the said Act of the General Assembly of Arkansas, authorizing the Circuit Court to make
121 an order requiring the plaintiff in error, as defendant in actions brought under said Act, to produce witnesses, and books, papers and documents to be used as evidence against itself and not in any way providing for defraying the expense incident to such production, were not repugnant to the Fourteenth Amendment of the Constitution of the United States, and that the judgment of the Pulaski Circuit Court rendered against the plaintiff in error on account of its failure to comply with the order made under the authority of said Section Eight, did not deny to it the equal protection of the law in violation of said Amendment.

V.

The Supreme Court of Arkansas erred in holding and deciding, that Section Nine of the said Act of the General Assembly of Arkansas, in so far as it authorized the Circuit Court to strike the pleadings of defendants in such actions for failure to comply with an order made for the production of witnesses and books, papers and documents, and to render judgment against such defendants by default, was not repugnant to the Fourteenth Amendment of the Constitution of the United States, and that the judgment of the Pulaski Circuit Court rendered in pursuance of the said Section, did not deprive the plaintiff in error of its property without due process of law in violation of said Amendment.

VI.

The Supreme Court of Arkansas erred in holding and deciding, that Section Nine of the said Act of the General Assembly of Arkansas, in so far as it authorized the Circuit Court to strike the pleadings of defendants in such actions for failure to comply with an order made for the production of witnesses and books, papers and documents and to render judgment against such defendants by default, was not repugnant to the Fourteenth Amendment of the Constitution of the United States, and that the judgment of the Pulaski Circuit Court rendered in pursuance of the said Section, did
122 not deny to the plaintiff in error the equal protection of the law in violation of said Amendment, even though said Section Nine did not authorize the rendition of a judgment against natural persons, under a similar state of case, natural persons equally with corporations, being embraced within the section of the statute authorizing the order for production.

VII.

The Supreme Court of Arkansas erred in holding and deciding, that so much of said Act of the General Assembly of the State of Arkansas as provides for the recovery of penalties against foreign corporations properly qualified and doing business in the State and authorized to do business therein, before, at the time and after the passage of the Act, on account of their being members of or parties to a pool, trust, agreement, combination, confederation or understanding to fix or maintain prices, theretofore formed or entered into without the State of Arkansas, and to affect prices only outside the State, and in no way to be put into effect or operation within the State, was not repugnant to Section Ten, Article One of the Constitution of the United States, or in violation of that portion of said Section which provides that no State shall pass any *ex post facto law.*

VIII.

The Supreme Court of Arkansas erred in holding and deciding, hat so much of said Act of the General Assembly of the State of Arkansas as provides for the recovery of penalties against foreign corporations properly qualified and doing business in the State and authorized to do business therein, before, at the time of and after he passage of the Act on account of their being members of or parties to a pool, trust, agreement, combination, confederation or understanding to fix or maintain prices, theretofore formed or ntered into without the State of Arkansas, and to affect prices only outside the State, and in no way to be put into effect or op-
23 eration within the State, was not repugnant to Section Ten, Article One of the Constitution of the United States, or in iolation of that portion of said Section which provides that no State hall pass any law impairing the obligation of contracts.

IX.

The Supreme Court of Arkansas erred in holding, that the order f the Pulaski Circuit Court made on September 10, 1906, calling

upon the plaintiff in error to produce before Lyle D. Taylor the persons therein named, as witnesses, together with any books, papers and documents in the possession or under the control of either of said persons, relating to the merits of this cause or to any defense therein, did not constitute an unreasonable search or seizure of its books, papers or documents or deprive the plaintiff in error of its property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States in that behalf.

X.

The Supreme Court of Arkansas erred in holding, that the order of the Pulaski Circuit Court made on September 10, 1906, calling upon the plaintiff in error to produce before Lyle D. Taylor the persons therein named, as witnesses, together with any books, papers and documents in the possession or under the control of either of said persons, relating to the merits of this cause or to any defense therein, did not discriminate between the plaintiff and defendant in the cause and between the defendant in such cause, when a foreign corporation and the defendant in a similar cause when a domestic corporation or a natural person and did not deny to plaintiff in error, being a foreign corporation, the equal protection of the law, in violation of the Fourteenth Amendment of the Constitution of the United States in that behalf.

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XI.

The Supreme Court of Arkansas erred in holding, that the action of the Pulaski Circuit Court, taken on the 21st day of October, 1906, in striking from the files the demurrer and answer of plaintiff in error, to the complaint of the defendant in error, and rendering a judgment by default for the sum of ten thousand dollars, against plaintiff in error, after denying it the right to make defense, did not deprive plaintiff in error of its property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States, in that behalf.

XII.

The Supreme Court of Arkansas erred in holding, that the action of the Pulaski Circuit Court, taken on the 21st day of October, 1906, in striking from the files the demurrer and answer of plaintiff in error, to the complaint of the defendant in error, and rendering a judgment by default for the sum of ten thousand dollars, against plaintiff in error, after denying it the right to make defense, did not deny to plaintiff in error the equal protection of the law, in violation of the Fourteenth Amendment of the Constitution of the United States, in that behalf, since the act did not provide for the rendition of such a judgment against the plaintiff and in favor of the defendant under similar circumstances, or for the rendition of a judgment against a natural person, when defendant, in the like state of case.

XIII.

The Supreme Court of Arkansas erred in holding, that the order of the Pulaski Circuit Court made September 10, 1906, calling upon

the plaintiff in error to produce before Lyle D. Taylor, the persons therein named as witnesses, together with any books, papers or documents in the possession or under the control of either of them, relating to the merits of this cause or to any defense therein,
125 did not wrongfully call upon the plaintiff in error to produce evidence to be used against itself in a penal action, and that the later action of said court in striking the answer and demurrer of plaintiff in error, because of its failure to comply with said order and in rendering judgment against it by default, did not deprive it of its property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States.

XIV.

The Supreme Court of Arkansas erred in holding, that the order of the Pulaski Circuit Court made September 10, 1906, calling upon the plaintiff in error to produce before Lyle D. Taylor, the persons therein named as witnesses, together with any books, papers or documents in the possession or under the control of either of them, relating to the merits of this cause or to any defense therein, did not wrongfully call upon the plaintiff in error to produce evidence to be used against itself in a penal action, and that the later action of said court in striking the answer and demurrer of plaintiff in error, because of its failure to comply with said order and in rendering judgment against it by default, did not deny to it the equal protection of the law, in violation of the Fourteenth Amendment of the Constitution of the United States, since the act did not provide for the making of such an order or the rendition of such a judgment against the plaintiff, upon motion of defendant and in such a cause, or for the rendition of such a judgment against a natural person for violation of such an order under similar circumstances.

XV.

The Supreme Court of Arkansas erred in holding and deciding, that the action of the Pulaski Circuit Court in striking the demurrer and answer of the plaintiff in error to the complaint filed against it, and in rendering judgment against it as upon default, for the sum of ten thousand dollars, on account of its failure to produce
126 as witnesses against it, the persons named in the order of September 10, 1906, such persons not being under the control of plaintiff in error or under any duty to appear as witnesses upon its request, did not deprive it of its property without due process of the law in violation of the Fourteenth Amendment of the Constitution of the United States, with reference thereto.

XVI.

The Supreme Court of Arkansas erred in holding and deciding, that the action of the Pulaski Circuit Court in striking the demurrer and answer of the plaintiff in error to the complaint filed against it, and in rendering judgment against it as upon default, for the sum of ten thousand dollars, on account of its failure to produce as witnesses against it, the persons named in the order of September

10, 1906, did not deny to it the equal protection of the law in violation of the Fourteenth Amendment of the Constitution of the United States, with reference thereto.

XVII.

The Supreme Court of Arkansas erred in holding and deciding, that the action of the Pulaski Circuit Court in striking the demurrer and answer of the plaintiff in error to the complaint filed against it and in rendering judgment against it as upon default, for the sum of ten thousand dollars, on account of its failure to produce the books, papers and documents named in the order of September 10, 1906, did not deprive it of its property without due process of the law in violation of the Fourteenth Amendment of the Constitution of the United States, with reference thereto.

XVIII.

The Supreme Court of Arkansas erred in holding and deciding, that the action of the Pulaski Circuit Court in striking the demurrer and answer of the plaintiff in error to the complaint filed against it, and in rendering judgment against it as upon default,
127 for the sum of ten thousand dollars, on account of its failure to produce the books, papers and documents named in the order of September 10, 1906, did not deny to it the equal protection of the law in violation of the Fourteenth Amendment of the Constitution of the United States, with reference thereto.

XIX.

The Supreme Court of Arkansas erred in holding valid the judgment of the Pulaski Circuit Court, which was rendered upon a complaint seeking to recover a penalty imposed by an Arkansas statute for acts of plaintiff in error not done within the State of Arkansas, nor affecting business done therein, and in holding that such judgment did not deprive the plaintiff in error of its property without due process of law, or deny to it the equal protection of the law, or violate the Fourteenth Amendment of the Constitution of the United States, with respect thereto.

XX.

The Supreme Court of Arkansas erred in adjudging and holding valid Section One of the said Act of Arkansas, in so far as it authorized the recovery against foreign corporations of the money penalty prescribed in Section Two of the Act, on account of acts done wholly outside the State of Arkansas and not affecting business therein, even though it might be invalid as affecting domestic corporations or natural persons alike with it embraced within the provisions of that Section, and in holding and adjudging that the said provisions of said Section and the judgment against plaintiff in error which was based thereon, did not deprive the plaintiff in error of its property without due process of law, or violate the Fourteenth Amendment of the Constitution of the United States, with respect thereto.

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XXI.

The Supreme Court of Arkansas erred in adjudging and holding valid Section One of the said Act of Arkansas, in so far as it authorized the recovery against foreign corporations of the money penalty prescribed in Section Two of the Act, on account of acts done wholly outside the State of Arkansas and not affecting business therein, even though it might be invalid as affecting domestic corporations or natural persons alike with it embraced within the provisions of that Section, and in holding and adjudging that the said provisions of said Section and the judgment against plaintiff in error which was based thereon, did not deny to plaintiff in error the equal protection of the law, or violate the Fourteenth Amendment of the Constitution of the United States, with reference thereto.

For which errors, the Hammond Packing Company prays that the judgment of the Supreme Court of Arkansas, dated January 14, 1907, be reversed and a judgment rendered for the plaintiff in error and for costs.

ROSE, HEMINGWAY, CANTRELL & LOUGHBOROUGH,
Attorneys for Hammond Packing Company.

Filed March 11th, A. D. 1907.
PEYTON D. ENGLISH, *Clerk.*

129

In the Supreme Court of Arkansas.

C. R. 1159.

HAMMOND PACKING COMPANY, Appellant,
v.
STATE OF ARKANSAS *ex Rel.* ROB'T L. ROGERS, Attorney General, Appellee.

Petition for Writ of Error.

To the Hon. Joseph M. Hill, Chief Justice of the Supreme Court of Arkansas:

Your petitioner, the Hammond Packing Company, respectfully represents, that on the 14th day of January A. D. 1907, a final judgment and decision was made and entered by this court in the above entitled case, then pending on appeal herein. That thereafter within the time allowed by law and by leave of this court, your petitioner filed its petition for a rehearing upon the said judgment and decision, which said motion was on the 18th day of February, 1907, overruled, leaving the said judgment and decision in full force and effect.

That in this action your petitioner drew in question the validity of parts of Sections One (1), Two (2), Eight (8) and Nine (9) of the Act of the General Assembly of the State of Arkansas, approved

January 23, 1905, entitled "An Act providing for the punishment of Pools, Trusts, and Conspiracies to Control Prices" etc., on the ground of their being repugnant to the Constitution of the United States, and the decision of this court was in favor of their validity.

Your petitioner, considering itself aggrieved by the decision and judgment of this court, above referred to, prays a writ of error therefrom to the Supreme Court of the United States, and an order fixing the amount of bond without supersedeas.

It tenders herewith its assignment of errors.

ROSE, HEMINGWAY, CANTRELL & LOUGHBOROUGH,
Attorneys for Hammond Packing Company.

130 STATE OF ARKANSAS, *ss:*

Supreme Court.

Let the writ of error issue upon the execution of a bond in the sum of One Thousand Dollars, conditioned as prescribed by Section 1000 of the Revised Statutes of the United States, for the payment of costs, not to operate as a supersedeas.

This the 11 day of March, 1907.

JOS. M. HILL,
Chief Justice of the Supreme Court of Arkansas.
B. B. BATTLE,
Presiding Judge of Supreme Court of Arkansas.

Filed March 11th A. D. 1907.
PEYTON D. ENGLISH, *Clerk.*

131 *Bond.*

THE HAMMOND PACKING COMPANY, a Corporation, Plaintiff in Error,
v.
THE STATE OF ARKANSAS *ex Rel.* ROB'T L. ROGERS, Attorney General, Defendant in Error.

Bond.

Know all men by these presents, that we, the Hammond Packing Company as principal and Mercantile Trust Co. and —— as sureties, are held and firmly bound unto the State of Arkansas, in the sum of One Thousand Dollars, to be paid to the said State, to which payment, well and truly to be made, we bind ourselves jointly and severally firmly by these presents.

Dated this eleventh day of March, 1907.

Whereas, the above named plaintiff in error seeks to prosecute its writ of error to the United States Supreme Court to reverse the

judgment rendered in the above entitled action by the Supreme Court of the State of Arkansas.

Now, therefore, the condition of this obligation is such, that if the above named plaintiff in error shall prosecute its said writ of error to effect, and answer all costs that may be adjudged if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

THE HAMMOND PACKING COMPANY,
By ROSE, HEMINGWAY, CANTRELL & LOUGHBOROUGH.
MERCANTILE TRUST CO.,
By J. E. OSBORNE, *Vice Pres.*

Attest:
W. L. HEMINGWAY, *Sec'y.*

Bond approved, and not to operate as a supersedeas.

JOS. M. HILL,
Chief Justice Supreme Court of Arkansas.
B. B. BATTLE,
Presiding Judge Supreme Court of Arkansas.

Filed M'ch 11th, A. D. 1907.

PEYTON D. ENGLISH, *Clerk.*

132 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Arkansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the Hammond Packing Company, a corporation, and the State of Arkansas, *ex rel.* Robert L. Rogers, Attorney General, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened, to the great damage of the said Hammond Packing Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected,

and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that
133 then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the eleventh day of March, in the year of our Lord one thousand nine hundred and seven.

W. P. FEILD,
Clerk Circuit Court United States, Western Division of the Eastern District of Arkansas.

[The Seal of the Circuit Court of East. Dist. Ark., Western Division, U. S. A.]

Allowed:

JOS. M. HILL,
Chief Justice Supreme Court of Arkansas.
B. B. BATTLE,
Presiding Judge of Supreme Court of Arkansas.

Filed March 11th, A. D. 1907.
PEYTON D. ENGLISH, *Clerk.*

134 The original of the foregoing bond was lodged with the clerk of the Supreme Court of the State of Arkansas on March 11, 1907, and the following indorsement made thereon: "Bond. Filed Mch. 11th A. D. 1907. Peyton D. English, Clerk."

P. D. ENGLISH,
Clerk Supreme Court,
By W. P. SADLER, *D. C.*

And the original of the foregoing writ of error was lodged with the clerk of the Supreme Court of the State of Arkansas on March 11, 1907, and also at the same time and place, a copy thereof for each one of the defendants, the State of Arkansas *ex rel.* Robert L. Rogers, Attorney General. One of said Copies being addressed personally to each of said defendants. The following indorsement was made upon the said original writ and upon each copy: "Writ of Error. Filed March 11th A. D. 1907. Peyton D. English, Clerk."

P. D. ENGLISH,
Clerk Supreme Court,
By W. P. SADLER, *D. C.*

And the original of the foregoing assignment of errors and prayer for reversal, the original of the foregoing petition for writ of error and allowance thereof, and the original of the Citation with acknowledgment of service thereof found at page 135, this transcript, was each lodged with the clerk of the Supreme Court of the State of Arkansas on March 11, 1907, the said original assignment of errors and prayer for reversal remaining on file in the office of said clerk, and copies of said petition for writ of error and allowance and of said citation with acknowledgment of service being at the same time lodged with said clerk for each of said defendants in error respectively. Each of the aforementioned papers was indorsed: "Filed March 11th A. D. 1907. Peyton D. English, Clerk."

P. D. ENGLISH,
Clerk Supreme Court,
By W. P. SADLER, *D. C.*

135 *Citation.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the State of Arkansas, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the Supreme Court of the State of Arkansas, wherein The Hammond Packing Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of Arkansas, this 11th day of March, 1907.

JOS. M. HILL,
Chief Justice Supreme Court of Arkansas.
B. B. BATTLE,
Presiding Judge of Supreme Court of Arkansas.

[Seal of the Supreme Court of Arkansas.]

Attest
PEYTON D. ENGLISH,
Clerk Supreme Court of Arkansas.

LITTLE ROCK, ARKANSAS, *March* 15, 1907.

I, attorney of record for the defendant in error in the above entitled case, hereby acknowledge due service of the above citation, and enter an appearance in the Supreme Court of the United States.

ROB'T L. ROGERS,
W. F. KIRBY, *Att'y Gen'l,*
Attorneys for the State of Arkansas.

Filed March 11th, A. D. 1907.
PEYTON D. ENGLISH, *Clerk.*

136 *Return to Writ.*

UNITED STATES OF AMERICA, *ss:*

Supreme Court of Arkansas.

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled cause, with all things concerning the same.

In Witness Whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court, in the City of Little Rock, this 20 day of March, A. D. 1907.

[Seal of the Supreme Court of Arkansas.]

P. D. ENGLISH,
Clerk of the Supreme Court of the State of Arkansas,
By W. P. SADLER, *Deputy.*

Costs of Suit.

Plaintiff's costs $69.40. ($52.50 paid by State.)
Defendant's costs $34.25. Paid by Hammond Packing Co.
Transcript cost $77.15. Paid by Hammond Packing Company.

Endorsed on cover: File No. 20,649. Arkansas supreme court. Term No. 271. Hammond Packing Company, plaintiff in error, *vs.* The State of Arkansas. Filed April 1st, 1907. File No. 20,649.

No. 54.

IN THE

Supreme Court of the United States.

HAMMOND PACKING COMPANY, APPELLANT,

vs.

STATE OF ARKANSAS,
EX REL. ATTORNEY GENERAL, APPELLEE.

MOTION TO ADVANCE CAUSE.

WILLIAM F. KIRBY,
Attorney General of Arkansas,
for Appellee.

LEWIS RHOTON,
Prosecuting Attorney of Sixth
Judicial District of Arkansas.

W. L. TERRY,
W. M. LEWIS,
F. GUY FULK,
JAS. H. STEVENSON,
Special Counsel for Appellee.

Thomas S. Tibbals, Printer, Little Rock, Ark.

IN THE

Supreme Court of the United States.

HAMMOND PACKING COMPANY, APPELLANT,

vs.

STATE OF ARKANSAS,
EX REL ATTORNEY GENERAL, APPELLEE.

MOTION TO ADVANCE CAUSE.

Comes the appellee, the State of Arkansas, by William F. Kirby, its Attorney General, and by special counsel in this cause retained, and pray the court that this cause be advanced and heard in preference to any civil cause now pending on the docket of this honorable court, and for cause states:

That this is a case involving the constitutionality of the Act of Arkansas, approved January 23rd, 1905, and entitled, "An Act for the Punishment of Pools, Trusts and Conspiracies to Control Prices, and as to Evidence and Prosecution in Such Cases."

That the precise question involved in this appeal is the constitutionality of Sections Eight and Nine of said Act, which provide, in substance, that the Attorney General of the State may sue out a commission to take the evidence of any officer, agent, director or employee of any defendant company sued under said Act; and that said company shall be required to produce for examination such officers, agents, directors and employees as are requested, together with such books, papers and documents as they may have in their charge or under their control, relating to the merits of the action; and, further, that upon failure or refusal of the said defendant company to so produce said persons, or upon refusal of such persons to appear and testify, the answer of the defendant may be stricken from the files and judgment rendered against it, as by default.

That in the case at bar, such a commission was sued out by the Attorney General of the State of Arkansas, to take the testimony of certain officers, agents, directors and employees of the appellant company, before a commissioner in Chicago, Illinois; and, upon the refusal of said appellant company to produce said persons, or any books, papers or documents before said commissioner, its answer was, on motion of the Attorney General, stricken out and judgment rendered against it for $10,000.

That said Sections Eight and Nine of said Act are the only effectual means by which the State of Arkansas may compel the testimony of the witnesses who have sole and peculiar knowledge of the illegal acts and combinations charged in the complaint. That there are now pending in said State suits similar to the one at bar, against Swift & Company, the Armour Packing Company, Armour & Company, Morris & Company, and the Cudahy Packing Company, wherein the ability of the State to proceed in the enforcement of its said statute is also wholly dependent upon the validity of said Sections Eight and Nine thereof; and that, by agreement of all parties, the case at bar was made a test case for the determination of the validity of said Sections, and an agreement made, staying the proceedings in all of said causes until the determination of said cause by this court.

That the Supreme Court of Arkansas has upheld the validity of said Sections and affirmed the judgment aforesaid; and that this is an appeal from said judgment.

That the aforesaid Act of January 23rd, 1905, is one designed for the punishment and exclusion of illegal combinations in restraint of trade; and that its enforcement is a matter of great public concern to said State.

That this is an action brought by the State of Arkansas and that it is the real and sole plaintiff therein.

That the execution of the laws of said State, and the operations of its government in its efforts to punish and exclude illegal combinations and monopolies, will be greatly hindered and embarrassed by delay in the decision of this cause.

Wherefore, appellee prays that this cause be advanced and set for as early a hearing as practicable.

Respectfully submitted,

WILLIAM F. KIRBY,
Attorney General of Arkansas,
for Appellee.

LEWIS RHOTON,
Prosecuting Attorney of Sixth
Judicial District of Arkansas.

W. L. TERRY,
W. M. LEWIS,
F. GUY FULK,
JAS. H. STEVENSON,
Special Counsel for Appellee.

We, counsel for the appellant herein, join in the request of counsel for the appellee that this cause be advanced.

W. E. HEMINGWAY,
G. B. ROSE,
For Appellant.

Office Supreme Court, U. S.
FILED,
APR 8 1907
JAMES H. McKENNEY,
CLERK.

54.

~~651.~~

No. ~~664.~~

IN THE

Supreme Court of the United States.

HAMMOND PACKING COMPANY, APPELLANT,

vs.

STATE OF ARKANSAS,
EX REL ATTORNEY GENERAL, APPELLEE.

MOTION TO ADVANCE CAUSE.

WILLIAM F. KIRBY,
Attorney General of Arkansas, for Appellee.

LEWIS RHOTON,
Prosecuting Attorney of Sixth Judicial District of Arkansas.

W. L. TERRY,
W. M. LEWIS,
F. GUY FULK,
JAS. H. STEVENSON,
Special Counsel for Appellee.

Tunnah & Pittard, Printers, Little Rock, Ark.

IN THE

Supreme Court of the United States.

HAMMOND PACKING COMPANY, APPELLANT,

vs.

STATE OF ARKANSAS,
EX REL ATTORNEY GENERAL, APPELLEE.

MOTION TO ADVANCE CAUSE.

Comes the appellee, the State of Arkansas, by William F. Kirby, its Attorney General, and by special counsel in this cause retained, and pray the court that this cause be advanced and heard in preference to any civil cause now pending on the docket of this honorable court, and for cause states:

That this is a case involving the constitutionality of the Act of Arkansas, approved January 23rd, 1905, and entitled, "An Act for the Punishment of Pools, Trusts and Conspiracies to Control Prices, and as to Evidence and Prosecution in Such Cases."

That the precise question involved in this appeal is the constitutionality of Sections Eight and Nine of said Act, which provide, in substance, that the Attorney General of the State may sue out a commission to take the evidence of any officer, agent, director or employee of any defendant company sued under said Act; and that said company shall be required to produce for examination such officers, agents, directors and employees as are requested, together with such books, papers and documents as they may have in their charge or under their control, relating to the merits of the action; and, further, that upon failure or refusal of the said defendant company to so produce said persons, or upon refusal of such persons to appear and testify, the answer of the defendant may be stricken from the files and judgment rendered against it, as by default.

In the case at bar, such a commission was sued out by the Attorney General of the State of Arkansas, to take the testimony of certain officers, agents, directors and employees of the appellant company, before a commissioner in Chicago, Illinois; and, upon the refusal of said appellant company to produce said persons or any books, papers or documents before said commissioner, its answer was, on motion of the Attorney General, stricken out and judgment rendered against it for $10,000.

That said Sections Eight and Nine of said Act are the only effectual means by which the State of Arkansas may compel the testimony of the witnesses who have sole and

peculiar knowledge of the illegal acts and combinations charged in the complaint. That there are now pending in said State suits similar to the one at bar, against Swift & Company, the Armour Packing Company, Armour & Company, Morris & Company and the Cudahy Packing Company, wherein the ability of the State to proceed in the enforcement of its said statute is also wholly dependent upon the validity of said Sections Eight and Nine thereof; and that, by agreement of all parties, the case at bar was made a test case for the determination of the validity of said Sections, and an agreement made, staying the proceedings in all of said causes until the determination of said cause by this court.

That the Supreme Court of Arkansas has upheld the validity of said Sections and affirmed the judgment aforesaid; and that this is an appeal from said judgment.

That the aforesaid Act of January 23rd, 1905, is one designed for the punishment and exclusion of illegal combinations in restraint of trade; and that its enforcement is a matter of great public concern to said State.

That this is an action brought by the State of Arkansas and that it is the real and sole p[illegible]tiff therein.

That the execution of the laws of said State and the operations of its government in its efforts to punish and exclude illegal combinations and monopolies, will be greatly hindered and embarrassed by delay in the decision of this cause.

Wherefore, appellee prays that this cause be advanced and set for as early a hearing as practicable.

Respectfully submitted,

WILLIAM F. KIRBY,
Attorney General of Arkansas,
for Appellee.

LEWIS RHOTON,
Prosecuting Attorney of Sixth
Judicial District of Arkansas.

W. L. TERRY,
W. M. LEWIS,
F. GUY FULK,
JAS. H. STEVENSON,
Special Counsel for Appellee.

We, counsel for the appellant herein, join in the request of counsel for the appellee that this cause be advanced.

W. E. HEMINGWAY,
G. B. ROSE,
For Appellant.

Office Supreme Court, U. S.
FILED.
FEB 21 1907
JAMES H. McKENNEY,
Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 54.

HAMMOND PACKING CO., PLAINTIFF IN ERROR,

vs.

STATE OF ARKANSAS EX REL., DEFENDANT IN ERROR.

SUPPLEMENTAL STATEMENT.

In making its statement of the case, the plaintiff in error has omitted several matters which we deem of some importance, and has seemed to misconceive several other matters contained in the record. We therefore call attention to the following points in connection with its said statement:

First. It is true, as stated at page 5 of the brief for plaintiff in error, that the court made an order for the oral examination, before a commissioner, of certain named officers, agents, directors, and employees of the defendant corporation; and for the production of any books, papers, and documents in the possession or under the control of either of said persons, relating to the merits of the cause (*Tr., 13*).

But there is another and very important clause of said order which plaintiff in error has omitted. It reads:

"*Provided, that at such examination the witnesses and* "*books aforesaid shall not be required to be produced, at any* "*one time, in such numbers as to interfere with the opera-* "*tion of the defendant's business*" (*Tr., 13*).

Second. The statement made by plaintiff in error, at page 5, as to the contents of the affidavit of the Attorney General, does not reflect the real contents and meaning of same.

Plaintiff in error states that the Attorney General said:

"That he did not know what could be proved by any one "of the witnesses asked for, or what information was con- "tained in any book or paper."

The affidavit reads:

"I, * * * do solemnly swear that I am unable, at "this time, *to designate and particularly point out the books,* "*papers, and documents* which will be required in evi- "dence * * *; *that the contents and particular descrip-* "*tion of said books, papers, and documents are matters pe-* "*culiarly within the knowledge of the defendants and the* "*witnesses* whose examination is prayed * * *; and that "it is impossible and impracticable for me at this time to "*designate particularly the matters as to which each wit-* "*ness* * * * *can testify*, or *frame interrogatories to such* "*witnesses, or state at this time the substance of his evidence,* "for the reason that the matters as to which it is sought to "examine said witnesses are matters touching the conduct "and business of the defendant company, and as to which "the defendant and said witnesses have peculiar and sole "knowledge" (*Tr., 7*).

The statement here made and the reasons therefor given are quite different from the extreme and forced construction placed upon the affidavit by plaintiff in error.

Third. At page 6 of the brief for plaintiff in error, the statement is made that the order of production directed that the witnesses, books, papers, and documents "be produced at the time and place named, and if adjournment was had that they be produced at the same place from time to time until the taking of depositions was completed."

This statement is inaccurate and misleading in particulars:

1st. As shown by the proviso in the order (*Record, 14*), the court specially guarded against the requirement of all the witnesses, books, papers, and documents at any one time.

2nd. The order specifically provides that the books, papers, and documents be produced from time to time "as demanded"—not all at once (*Record, 14*).

Fourth. The statement made by plaintiff in error fails to show what was done before the commissioner. It appears that, on receipt of the commission, he served a notice on the corporation, as required by the act, informing it of the terms of his commission and of what evidence (witnesses, books, papers, and documents) it was expected to produce, and when and where the hearing would be had (*Record, 48, 49*).

That, on the day named, the corporation appeared by attorneys, and that, by consent, the taking of evidence was continued over from day to day until October 2, 1906.

That on October 2, 1906—present both parties by attorneys—"the commissioner, at the request of the plaintiff, called for the production for examination of Mr. *Armour* and the other *witnesses* named in the commission" (*Record, 48*).

No request or demand was made at that time for the production of any books, papers, or documents; and as to the production of only one witness could be examined at a time, the production of

A. Ogden Armour would have been a substantial and reasonable compliance with the order of the commissioner.

The corporation met this request with a written refusal broader than the request, in that it declined to produce any of its officers or employees or any books, papers and documents, alleging simply that the commissioner had no right to require it so to do (Record, 16-17).

Respectfully submitted,

Lewis Emory,
Prosecuting Attorney,
Jas. M. Sheppard,
E. Kent Hall,
For Defendant in Error.

W. L. Penn,
W. M. Lewis,
Edward L. Rogers,
William R. Kerr, Attorney General,
Of Counsel.

54.

FILED.
FEB 25 1908
JAMES H. McKENNEY,
Clerk.

SYNOPSIS OF BRIEF

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Supreme Court, U. S.
FILED.
FEB 18 1907
JAMES H. McKENNEY,
CLERK.

No. 54.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1907.

HAMMOND PACKING COMPANY, a Corporation, *Plaintiff in Error,* vs. **THE STATE OF ARKANSAS** ex rel., etc., *Defendant in Error.*	In Error to the Supreme Court of the State of Arkansas.

STATEMENT, BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

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Of Counsel.

GUNTHORP WARREN PRINTING CO., CHICAGO

IN THE

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STATEMENT, BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

STATEMENT.

The writ of error herein presents to this court for review the final order of the Supreme Court of the State of Arkansas, affirming a judgment entered by the Circuit Court of Pulaski County in an action brought by the State of Arkansas as complainant, against Hammond Packing Company, a corporation organized under the laws of the State of Illinois, and doing business in the State of Arkansas.

The complaint charged that on the dates named the defendant was transacting business in Pulaski County, Arkansas, and that it had created, entered into and become, and was then, a member of and a party to, a pool, trust, agreement, combination, confederation and understanding with certain other corporations, partnerships, individuals, persons and associations of persons, engaged in lines of business similar to that conducted by it, amongst which were corporations, twenty or more in number, to regulate and fix the selling price of certain articles of manufacture, merchandise, commodity or convenience, to-wit, the commercial products of slaughtered live stock, and to maintain such price when so regulated or fixed.

Where the defendant had created, entered into, or become a member of the pool, trust, agreement, combination, confederation or understanding; *how* it had created, entered into or become a member of the alleged understanding; *when* it was done,—whether one day or ten years before the date charged—or *what* the terms or conditions of such confederation were, is wholly undisclosed. It is alleged that the arrangement was made to regulate and fix the selling price of the commercial products of slaughtered live stock, and to maintain the price when regulated and fixed, but there is no intimation as to whether the price so fixed is of general application or local, or whether it applies to one market or to the markets of the world generally, or whether it applies to the markets of a foreign country. The terms of the arrangement which the pleader denominates as a pool, trust, etc., are not so set out as to show whether it would involve elements constituting

such a pool or trust, and are not so set out as that the judgment of the court might be had upon the question whether such an arrangement did constitute a pool or trust as is alleged. The complaint contains no statement of facts as the Arkansas statute requires (Kirby's Digest, Sec. 6091), but a mere conclusion of the pleader in the language of the statute, based upon alleged facts which he did not see fit to disclose and which it is reasonable to infer he did not know. (Attorney General's Affidavit. Trans., 7.)

In order that defendant might have the judgment of the court upon the question of the sufficiency of the facts relied upon to constitute the alleged pool or trust, and the general sufficiency of the facts relied upon to constitute the offense, and in order that the defendant might know what it would be called upon to meet at the trial, on the 8th of March, 1906, it filed a motion for a rule on plaintiff to make the allegations of its complaint more definite and certain, so as to show *when* the pool, trust, etc., charged in the complaint, was created, *where* it was created, *what* its terms and conditions were, and in what respect it constituted such pool or trust in violation of the statute; and to show what portions of the large business conducted by plaintiff in error were embraced within the terms of such pool or trust. This motion was overruled, and the defendant excepted.

Thereupon the plaintiff below presented an application to the court in which it alleged that sixteen persons named were officers or employes of the defendant company; that they resided outside of the State of Arkansas and in or near the City of Chicago, Illinois;

that the plaintiff desired to take their testimony upon oral interrogatories; that they were unwilling and hostile witnesses, and, as the relator believed, would not, in response to written interrogatories, make full answers; that the relator could have no accurate knowledge as to what facts were within the knowledge of said persons, but that they had peculiar and sole knowledge as to that; and that the relator could not frame interrogatories so as to elicit the facts within their knowledge; that the persons named had in their possession at the Chicago offices of the defendant, numerous books, papers and documents bearing upon the issues of the case; that the precise description of the books was peculiarly within the knowledge of the persons named, and that it was impossible for the relator to so frame interrogatories or demands as to call for the production of such books, papers and documents as are relevant to the issues in this case; that on account of the facts above set out, it was necessary that the depositions of these witnesses be taken orally; and plaintiff asked that the defendant be required to produce the persons named, and the books, papers and documents in their possession, relating to the issues in the case, before a commissioner in Chicago to be authorized by this court to take depositions. The defendant resisted the motion and filed a counter-motion in which it asked that the plaintiff be required to set out specifically what it expected to prove by each witness whose production was asked, and also the description of any books it desired to have produced, and to show what said books contained that was material to the issues in the case.

In response to this motion, the Attorney General filed

an affidavit stating that he did not know what could be proved by any one of the witnesses asked for, or what information material to the issues of the case, was contained in any book or paper. (Tr., 7.) The court thereupon sustained the motion for the appointment of a commissioner to take depositions in Chicago, and ordered defendant to produce the persons named in the motion of the plaintiff, *"and also all books, papers and documents in the possession or under the control of either of said parties, relating to the merits of the cause, or to any defense therein."* The order required the commissioner to issue a notice to the president of the defendant company that the testimony of the persons named was desired, and requesting him to have the persons, with the books, papers and documents referred to, at the office of the commissioner on the day named, to give their testimony, and to have them attend at such place from day to day and from time to time until the taking of their testimony should be completed, and at such places and times to produce the books, papers and documents whenever demanded.

The court refused to require any showing to be made as to what any of the parties called for knew material to the issues of the case, or as to what any of the books contained material to the issues, or to designate in any manner the books to be produced. The defendant company excepted to its action in these respects, and also excepted to its action in calling upon it to produce either witnesses or books, papers or documents. Thereupon the commissioner directed a notice to the president of plaintiff in error, as required by said order, commanding him to produce at the office of the commissioner

the persons named in the order, and "any books, papers or documents *in the possession of either of said persons* relating to the merits of said cause or any defense therein."

The plaintiff in error failed to produce the witnesses or books, papers and documents called for in said notice, on the ground that the court was not warranted in making the order pursuant to which the notice was given, and that the notice called upon it to surrender rights, the enjoyment of which were guaranteed by the constitutions of the United States and of the State of Arkansas.

It will be observed that the order for the production of books contained no designation whatever of what books were to be produced, nor is the order limited to books which were the property of the plaintiff in error, but it is specifically directed to produce "any books, papers and documents in the possession of or under the control of either of said persons (the proposed witnesses) relating to the merits of said cause, *or to any defense therein*"; and it further directed that they be produced at the time and place named, and if any adjournment were had, that they be produced at the same place from time to time until the taking of the depositions was completed.

The order contained no provision in any way preserving the secrecy of the books or such parts of them as might not be material to the issues in the case, but required that they be produced at a time and place designated, and thereafter indefinitely from day to day until the taking of depositions was completed, under such circumstances that their entire contents of every

character and description were subject to the scrutiny of the general public, newspaper reporters or competitors of the plaintiff in error, to whom would have there been disclosed many of the trade secrets acquired by the plaintiff in error through the successful conduct of its business for many years.

Upon the failure of the defendant to comply with the order, plaintiff filed its motion to strike its pleadings from the files and for judgment by default. (Tr., 29.) To this motion a response was filed by the defendant (Tr., 32) setting out many grounds of objection to the motion, but the court sustained it, struck the demurrer and answer of the defendant from the files, and proceeded to render judgment by default. (Tr., 36.)

The parties had entered into a stipulation that if this action were taken, and the court rendered any money judgment, it should be entered upon the first paragraph of the complaint, and for the sum of $10,000, which was accordingly done. (Tr., 28.) The defendant thereupon filed a motion to set aside the judgment so entered against it by default, and for a new trial (Tr., 37); which set out in detail the grounds relied upon for a reversal of the judgment; which was overruled and the defendant excepted and appealed to the Supreme Court of the State of Arkansas. The opinion of Chief Justice Hill is set out beginning on page 54 of the transcript, and is reported in 100 S. W., at page 407. Mr. Justice Wood filed a special concurring opinion subsequent to the issuance of the writ of error in this case and too late to be incorporated in this record. This opinion is, however,

found reported at page 1199 of Vol. 100 of the S. W. Reporter; and to that opinion we particulary invite the attention of the court.

The act of the legislature of the State of Arkansas by the authority of which these proceedings were had, may be found at pages 9 and 10 of the Acts of 1905, passed January 23rd, 1905, and is entitled: "An Act Providing for the Punishment of Pools, Trusts and Conspiracies to Control Prices and as to Evidence and Prosecution in such cases." Sections 1, 8 and 9, the constitutionality of which are involved herein, are as follows:

> Sec. 1. "Any corporation organized under the laws of this or any other state or country, *and transacting or conducting any kind of business in this state,* or any partnership or individual, or other association or persons whatsoever, who are now, or shall hereafter, create, enter into, become a member of or a party to any pool, trust, agreement, combination, confederation or understanding, *whether the same is made in this state or elsewhere,* with any other corporation, partnership, individual or any other person or association or persons, to regulate or fix, *either in this state or elsewhere,* the price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning or tornado, or to maintain said price when so regulated or fixed, or who are now or shall hereafter enter into, become a member of or a party to any pool, trust, agreement, contract, combination, association or confederation, *whether made in this state or elsewhere,* to fix or limit, *in this state or elsewhere,* the amount or quantity of any article of manufacture, mechanism, merchan-

dise, commodity, convenience, repair, and product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning, storm, cyclone, tornado, or any other kind of policy issued by any corporation, partnership, individual or association of persons aforesaid, shall be deemed and adjudged guilty of a *conspiracy to defraud*, and be *subject to the penalties* as provided by this act."

Sec. 8. "Whenever any proceeding shall be commenced in any court of competent jurisdiction in this state by the attorney general or prosecuting attorney against any corporation or corporations, individual or individuals, or association of individuals, or joint stock association or copartnership under the law against the formation and maintenance of pools, trusts of any kind, monopolies or confederations, combinations or organizations in restraint of trade, to dissolve the same or to restrain their formation or maintenance in this state, or recover the penalties in this act provided, then and in such case, if the attorney general or *prosecuting attorney desires* to take the testimony of any officer, director, agent or employee *of any corporation or joint stock association* proceeded against, or in case of a *copartnership*, any of the members of said partnership, or any employee thereof, in any court in which said action may be pending; and the individual or individuals whose testimony is desired are without the jurisdiction of this state, or reside without the State of Arkansas, then in such case, the attorney general or prosecuting attorney may file in said court in term time, or with the judge thereof in vacation, a statement, in writing, setting forth the *name or names of the persons or individuals whose testimony he desires to take*, and the *time* when and the *place* where *he desires* said persons to appear; and thereupon *the court or judge thereof shall* make an order for the taking of said testimony, of such person or persons and for the

production of any books, papers and documents in his possession or under his control relating to the merits of any suit, or to any defense therein, and shall appoint a commission for that purpose, who shall be an officer authorized by law to take depositions in this state, and said commissioner shall issue immediately a notice, in writing, directed to the attorney or attorneys of record in said cause, or agent, or officer, or other employee, that the testimony of the person named in the application of the attorney general or the prosecuting attorney is desired, and *requesting said attorney or* attorneys of record, or *said officer,* agent or employee, to whom said notice is delivered, and upon whom the same is served, *to have said* officer, agent, employee, representative of said copartnership, or agent thereof, whose evidence it is desired to take, together with such books, papers and documents, at the place named in the application of the attorney general, or the prosecuting attorney, and at the time fixed in said application, then and there to testify; *provided, however,* That such application shall always allow in fixing said time the same number of days' travel to reach the designated place in Arkansas that would now be allowed by law in case of taking depositions; *provided, also,* In addition to the above named time, six days shall be allowed for the attorney or attorneys of record, or the agent, officer or employee on whom notice is served, to notify the person or persons whose testimony is to be taken. Service of said notice as returned in writing may be made by any one authorized by law to serve a subpoena."

Sec. 9. "Whenever the *persons mentioned* in the preceding sections *shall be notified,* as above provided, *to request* any officer, agent, director or employee to attend before any court or before any person authorized to take the testimony in said proceedings, and the *person or persons whose testimony is requested,* as above provided, *shall fail to*

appear and testify and produce any books, papers and documents, *they may be ordered to produce by the court, or the other officer authorized to take such evidence,* then *it will be the duty of the court,* upon motion of the attorney general or prosecuting attorney, *to strike out the answer,* motion, reply, demurrer or other pleading then or thereafter filed in said action or proceeding by the said *corporation, joint stock association or copartnership,* whose officer, agent, director or employee has neglected or failed to attend and testify and produce all books, papers and documents he or they shall have been ordered to produce in said action by the court or person authorized to take said testimony, and said court shall proceed to render *judgment by default against said corporation, joint stock association or co-partnership. And it is further provided,* that in case any officer, agent, employe, director or representative of any corporation, joint stock association or co-partnership in such proceeding, as hereinbefore mentioned, who shall reside or be found within this State, shall be subpoenaed to appear and testify or to produce books, papers and documents, and shall fail, neglect or refuse to do so, then the answer, motion, demurrer or other pleading then and thereafter filed by said corporation, joint stock association or co-partnership in any such proceeding, shall, on motion of the attorney general or prosecuting attorney, be stricken out and judgment in said cause rendered against said corporation, joint stock association or co-partnership."

Specification of Errors.

By the demurrer and answer filed by defendant in the Circuit Court and stricken from the files; by its motion to set aside such default judgment and to grant it a new trial; by the assignments of error filed in the State Supreme Court, and by its printed brief and oral argu-

ments before that Court, the plaintiff in error has contended that the provisions of said Act are violative of the Constitution of the United States in the following particulars:

1. As to Section 1,—

(a) Because it prescribes penalties for acts done and transactions occurring wholly outside of the State of Arkansas and in other States or in foreign countries. It is, therefore, extra territorial, and its enforcement would deprive the defendant of its property without due process of law, in violation of the Fourteenth Amendment to the constitution of the United States. (Assignment of Errors, I, II, XIX, XX, XXI.)

(b) It prescribes punishment for past transactions, and is therefore *ex post facto*, and violative of Section 10 of Article 1 of the Constitution of the United States. (Assignment of Errors, VII.)

(c) It denies to persons within the State the equal protection of its laws, and is invalid as being contrary to the Fourteenth Amendment to the Constitution of the United States. (Assignment of Errors, I, II.)

(d) It seeks to deprive corporations authorized by the State to do business therein, of their rights under their contracts with the State, and it, therefore, violates Section 10, Article 1 of the Constitution of the United States, which prohibits any State from enacting any law impairing the obligation of contracts. (Assignment of Errors, VIII.)

2. As to Section 8, which authorizes the Court to make an order for the production of witnesses, books

apers, it was contended that said Section was unitutional and void,—

Because it deprives the defendant of its right to witnesses against it produced in person, and to be onted by them at the trial, in violation of the and Fourteenth Amendments to the Constitution e United States. (Assignment of Errors, III, IV.)

It subjects the defendant to unreasonable search seizure of its books, papers and documents, and upon it to produce evidence against itself in a action, while the plaintiff in this cause and defendin other causes, are not subjected to such require-, contrary to the provisions of the Fourth, Fifth Fourteenth Amendments to the Constitution of the ed States. (Assignment of Errors IV, IX, X,)

The order of the State Court required the dent to produce, under penalty of being defaulted, ooks, papers or documents relating to "any de- it may have to such action." This requirement nreasonable and unjust, and constituted a denial e defendant of due process of law and the equal ction of the law, contrary to the Fourteenth dment to the Constitution of the United States. gnment of Errors XIII, XIV.)

The defendant could not be required to obey the made as a condition to being heard in its own se, and the court cannot deny it the right to be , as a punishment for such disobedience. Such an denied to the defendant its right to protect its rty, and to have justice, freely and without price,

completely and without denial, and deprived the defendant of its property without due process of law, and denied to it the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States. (Assignment of Errors V, XII.)

3. As to Section 9,—

The action of the State Court in striking the defendant's pleadings and rendering judgment against it by default for its failure to produce the witnesses and books, papers and documents as above set out, constituted a denial to the defendant of the equal protection of the law, and deprived it of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States. (Assignment of Errors V, VI, XI, XII, XV, XVI, XVII, XVIII.)

The final decision of the State Court overruled the contentions of the defendant with respect to the constitutionality of the several sections of said Act, and sustained the same as being in all respects valid and not violative of the Constitution of the United States.

BRIEF.

I.

SECTION 1 OF THE ACT IN QUESTION, AS CONSTRUED BY THE SUPREME COURT OF THE STATE OF ARKANSAS, IMPAIRS THE OBLIGATION OF THE CONTRACT BETWEEN THE DEFENDANT AS A FOREIGN CORPORATION, AND THE STATE, WHEREBY THE DEFENDANT WAS PERMITTED TO DO BUSINESS WITHIN THE STATE: AND IS THEREFORE VIOLATIVE OF SECTION 10 ARTICLE 1 OF THE CONSTITUTION OF THE UNITED STATES.

American Smelting & Refining Co. v. *Colo. ex rel. Lindsley,* 204 U. S., 103.

Concurring opinion of Mr. Justice Wood, 100 S. W., 1099.

Hartford Ins. Co. v. *State,* 89 S. W., 42.

Sec. 11, Art. 12, Constitution of Arkansas.

Secs. 824, 825, 826, 827 and 828, Kirby's Digest Statutes of Arkansas.

15 A. & E. Ency. Law (2nd Ed.), p. 1049.

Commonwealth v. *Proprietors of New Bedford Bridge,* 2 Gray, 339.

Washington Bridge Co. v. *State,* 18 Conn., 53.

N. M. Co. v. *Coon,* 6 Pa. St., 379.

State Tax on Foreign Held Bonds, 15 Wall., 320.

Gordon v. *Appeal Tax Court,* 3 How., 133.

Wendover v. *City of Lexington,* 15 B. Monroe, 258.

Attorney General v. *Bank of Charlotte,* 4 Jones Equity (N. C.), 293.

Miller v. *State*, 15 Wall., 497.
Coast Line R. R. Co. v. *Savannah*, 30 Fed., 646.
Erie R. R. v. *Pa.*, 153 U. S., 628.
C. R. I. & P. Ry. Co. v. *Ludwig, Secy. of State*, W. Div. E. Dist. Ark., opinion, Trieber, J., Oct. 5th, 1907; 156 Fed., 152.
Commonwealth v. *M. & O. R. R. Co.*, 64 S. W., 452.
Seaboard Air Line R. R. Co. v. *R. R. Com. of Ala.*, 155 Fed., 792.
British Am. Mtg. Co. v. *Jones*, 56 S. E., 983.

II.

SECTION 1 OF THE ACT IN QUESTION LEGISLATES RELATING TO TRANSACTIONS OCCURRING BEYOND THE LIMITS OF THE STATE OF ARKANSAS, AND IS THEREFORE EXTRA-TERRITORIAL, AND ITS ENFORCEMENT WOULD CONSTITUTE A TAKING OF THE PROPERTY OF DEFENDANT WITHOUT DUE PROCESS OF LAW, AND CONSTITUTE A DENIAL TO IT OF THE EQUAL PROTECTION OF THE LAW, CONTRARY TO THE TERMS OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Casey v. *State*, 53 Ark., 334.
Cooley's Constitutional Limitations, pp. 176, 177.
People v. *Butler St. Foundry Co.*, 201 Ill., 236.
Chicago Wall Paper Mills v. *General Paper Co.*, 147 Fed., 491.
Cargyle Co. v. *Minn.*, 182 U. S., 452.
Carroll v. *Greenwich Ins. Co.*, 199 U. S., 409.
Santa Clara Co. v. *So. Pac. Ry.*, 118 U. S., 394.

Charlotte etc. Ry. Co. v. *Gibbs*, 142 U. S., 386.
Covington, etc., Co. v. *Stanford*, 164 U. S., 578.
Mo. Pac. Ry. v. *Mackey*, 127 U. S., 209.
N. Y. Life Ins. Co. v. *Smith*, 41 S. W., 687.
Baltimore, etc., Ry. v. *Read*, 62 N. E., 488.

III.

SO MUCH OF SECTION 8 OF THE ACT IN QUESTION AS PURPORTS TO AUTHORIZE THE COURT TO MAKE AN ORDER FOR THE PRODUCTION OF WITNESSES, BOOKS AND PAPERS, IS UNCONSTITUTIONAL AND VOID, AND DID NOT WARRANT THE MAKING OF AN ORDER IN PURSUANCE OF ITS PROVISIONS.

(a) *It subjects the defendant to unreasonable search and seizure of its books, papers and documents, and thereby violates the Fourth and Fourteenth Amendments to the Constitution of the United States.*

(b) *It calls upon the defendant to produce evidence to be used against itself in a penal action, and thereby violates the Fifth and Fourteenth Amendments to the Constitution of the United States.*

(c) *It denies to the defendant the equal protection of the law, and constitutes a taking of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.*

Boyd v. *U. S.*, 116 U. S., 617.
Monongahela, etc., Co. v. *U. S.*, 148, U. S., 325.
Interstate Commerce Co. v. *Britton*, 154 U. S., 479.
Hale v. *Henkle*, 201 U. S., 43.
Logan v. *Pa. Ry. Co.*, 132 Pa. St., 403.

Cooley's Constitutional Limitations, pp. 368, 370, 372.
Lester v. *People,* 150 Ill., 408.
Rothwill v. *Bank,* 20 Hun., 517.
Com. v. *Lottery Tickets,* 5 Cush., 369.
Sanford v. *Nichols,* 13 Mass., 286.
Lee v. *Angas,* L. R. 2, Eq., 39.
Ex parte Brown, 72 Mo., 83.
Tharp v. *Paige,* 66 Ark., 229.
State v. *Slamon,* 73 Vt., 212.
Peo. v. *Western Insurance Co.,* 40 Ill. App., 428.
Boyle v. *Schmidtland,* 146 Pa. St. 255.
Gunn v. *Railway,* 50 N. E., 132.
Gulf, etc., Railway v. *Ellis,* 165 U. S., 150.
Mo. Pac. Ry. v. *Mackey,* 127 U. S., 209.
Central, etc. v. *Board of Trade,* 125 Fed., 468.
Wigmore on Evidence, Vol. 3, Sec. 2259.
State v. *Simmonds Hardware Co.,* 18 S. W. (Mo.), 1125.
Cooley's Constitutional Limitations, p. 370.
Counselman v. *Hitchcock,* 142 U. S., 547.
Brown v. *Walker,* 161 U. S., 591.

(d) *When the State goes into the courts for the assertion of its rights it goes upon an equality with other litigants.*

State v. *Morgan,* 52 Ark., 150.
Brent v. *Bank,* 10 Peters, 596.
The Siren, 7 Wall., 159.
U. S. v. *Beebe,* 17 Fed., 41.

IV.

SO MUCH OF SECTION 9 OF THE ACT IN QUESTION AS PURPORTS TO AUTHORIZE THE COURT TO STRIKE FROM THE FILES THE PLEADINGS OF THE DEFENDANT UPON ITS FAILURE TO COMPLY WITH THE TERMS OF THE ORDER ENTERED PURSUANT TO SECTION 8, IS UNCONSTITUTIONAL AND VOID, AND THE JUDGMENT SO RENDERED CONSTITUTES A TAKING OF THE PROPERTY OF THE DEFENDANT WITHOUT DUE PROCESS OF LAW, AND A DENIAL TO IT OF THE EQUAL PROTECTION OF THE LAWS, IN VIOLATION OF THE TERMS OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

McVeigh v. *U. S.*, 11 Wall., 259.
Windsor v. *McVeigh*, 93 U. S., 274.
Hovey v. *Elliott*, 167 U. S., 444.
Boyd v. *U. S.*, 116 U. S., 617.
Orient Insurance Co. v. *Daggs*, 172 U. S., 557.
Holden v. *Hardy*, 169 U. S., 366.
Bradstreet v. *Neptune Ins. Co.*, 3 Sumn., 601.
Adams v. *Postal Telegraph Co.*, 155 U. S., 689-698.
Galpin v. *Page*, 18 Wallace, 330.
Lasere v. *Rochereau*, 17 Wall., 437.
Simon v. *Croft*, 182 U. S., 427.
Cooley's Constitutional Limitations, 6th Ed., p. 452.
Myers v. *Shields*, 61 Fed., 718.
Burton v. *Platter*, 53 Fed., 901.
Zeigler v. *R. R. Co.*, 58 Ala., 594.
State ex rel. v. *Billings*, 55 Minn., 473.
Foley v. *Foley*, 52 Pac., 122.

Younger v. *Superior Court,* 69 Pac., 485.
McClatchey v. *Superior Court,* 51 Pac., 696.
Greig v. *Ware,* 55 Pac., 163.
State v. *Clancy,* 61 Pac., 897.
Hebb v. *County Court,* 37 S. E., 678.
Underwood v. *McVeigh,* 23 Grattan (Va.), 409.
Fairfax v. *Alexander,* 28 Grattan (Va.), 16.
State v. *City of New Orleans,* 42 La. Ann., 92.
Re the Fred M. Lawrence, 94 Fed., 1017.
Altschule v. *Doyle,* 55 Calif., 633.
Fayerweather v. *Richt,* 88 Fed., 713.
Warner v. *Godfrey,* 186 U. S., 365.
Baltimore, etc. Ry. v. *Reade,* 62 N. E., 488.
Chapman v. *Phoenix Bank,* 85 N. Y., 437.
Grinson v. *Edwards,* 21 W. Va., 347.
Russell v. *Grant,* 122 Mo., 161.
State v. *Railway Co.,* 45 S. C., 464.
Darr, Administrator v. *Rohr,* 82 Va., 359.
Schlitz v. *Roenitz,* 86 Wis., 36.
Carroll, etc. v. *Parks,* 32 Ark., 131.
Hickman v. *Kempner,* 35 Ark., 505.
State v. *Newton,* 33 Ark., 276.
Little Rock, etc. Ry. v. *Payne,* 33 Ark., 816.
Smith v. *Leach,* 44 Ark., 287.
Clayton v. *Johnson,* 36 Ark., 406.

ARGUMENT.

I.

SECTION 1 OF THE ACT IN QUESTION, AS CONSTRUED BY THE SUPREME COURT OF THE STATE OF ARKANSAS, IS UNCONSTITUTIONAL AND VOID FOR THE REASON THAT IT IMPAIRS THE OBLIGATION OF THE CONTRACT BETWEEN THE STATE OF ARKANSAS AND DEFENDANT AS A FOREIGN CORPORATION, WHEREBY DEFENDANT WAS AUTHORIZED TO DO BUSINESS IN SAID STATE.

The said Section is set out in *haec verba* at page 8, *ante.*

The arguments of the plaintiff in error with respect to its constitutionality were met by the State Supreme Court with the following statement:

> "Appellant presents arguments against the construction placed on Section 1 of this Act in *Hartford Insurance Co.* v. *State,* 76 Ark., 303; 89 S. W., 42; but the rule of *stare decisis* forbids a re-examination of these questions."

The Hartford case was an action similar to the one at bar, wherein the defendant, a foreign corporation, was charged with being in a pool, trust, etc., while doing business in the State of Arkansas. Defendant answered the complaint by alleging that it was not guilty of a violation of the provisions of the Act because it was not a member of or a party to any pool, etc., made or entered into "in Arkansas," to regulate or fix the price or premium to be paid for insuring property anywhere, nor was it a member of any pool or agreement

entered into to fix or regulate the price or premium to be paid for insuring property within the State, or which in any manner affected or affects the price or premium to be paid for insuring property within the State. The parties thereupon stipulated that in the event defendant's answer should be held or adjudged insufficient as a defense, judgment should be at once entered in plaintiff's favor for a penalty of $200 and costs, and that if the judgment was not reversed by the Supreme Court, the penalty and costs, including costs in the Supreme Court, should be paid by the defendant on the determination of the action in the Supreme Court, *and that defendant was to take no appeal from the said Supreme Court of Arkansas.* The State demurred to the answer, demurrer was sustained and judgment entered for the State under the stipulation, and the Insurance Company appealed. The Court was divided on the case three and two. The opinion was written by Mr. Chief Justice Hill, author of the opinion in the case at bar, and dissenting opinions filed by Judges Battle and Wood. After relating the history of the Act, Mr. Chief Justice Hill presented the issues as follows:

> "These are the questions involved: Does the Act prohibit, under the penalty named therein, a foreign insurance corporation from doing business in Arkansas, while such a corporation is a member of a pool, trust or combination to fix insurance rates anywhere, although such a pool, trust or combination is not created or maintained in Arkansas, and does not affect or fix, or attempt to do so, rates of insurance in Arkansas? To state the proposition by illustration: assume that the appellant is a member *of* a trust, called a 'rating bureau,' created and maintained in New York City

to fix insurance rates in New York City and St. Petersburg, but it does not fix or affect rates in Arkansas, is it guilty of a violation of the Act if it transacts an insurance business in Arkansas, upon complying with all of the statutes of this State except the one at bar?

Second: If the act reaches to, and makes unlawful, the transaction of an insurance business in Arkansas by a foreign insurance company while belonging to a trust, pool, or combination to fix or affect rates in other places than Arkansas but not in Arkansas, is the Act constitutional, and is it within the power of the State to enact it?"

The court thereupon proceeds at length with its reasons for holding the affirmative of the proposition first above stated, and to that reasoning we respectfully invite the attention of this Court.

Proposition two above stated, is then disposed of in the following language:

"2. In *State* v. *Lancashire Insurance Co.*, 66 Ark., 466; 51 S. W., 633; 45 L. R. A., 348, the court, in construing the Rector Act, says: 'As the legislature has power to entirely exclude foreign insurance companies from doing business in this state, it can, of course, dictate the terms upon which such companies may do business here. The whole matter rests in the discretion of the legislature.' This Act requires every corporation doing business in this state to annually make affidavit that it does not belong to any trust described in the first section of it, to fix prices in this state or elsewhere, provides for the prosecution against them for a failure to make such affidavit, and for the right to do business to be forfeited, and in other ways clearly indicates that it shall be unlawful to do business in this state while belonging to a trust to fix prices anywhere. It gives sixty days to the corporation then doing business to come within its terms, and thereafter it was unlawful to trans-

act any business in the state while maintaining a membership in a trust anywhere to fix prices anywhere. *In the language of the Lancashier case, the state has dictated these terms upon which foreign insurance companies can do business in this state.* Limiting the decision entirely to the facts before the court, it is held that the state has declared, and possesses the right to declare, that foreign insurance corporations cannot do business in this state while belonging to a pool, trust, combination, conspiracy or confederation to fix or affect insurance rates anywhere."

The statute under consideration was passed by the legislature of Arkansas on January 23rd, 1905, prior to which time the legislature had prescribed certain terms and conditions upon which foreign corporations could do business within the state. The plaintiff in error had complied with all of such terms and conditions and was at that time lawfully conducting its business in the state under and by virtue of the permit so granted to it, and on the faith and credit thereof had, as set out in its amended answer (Tr., 22) "invested large sums of money in the purchase of real and personal property situated in said state, and in establishing and promoting its sales business therein, and continually since it was so admitted and authorized to do business in said state, it has conducted a portion of its business therein; * * * defendant alleges that it has expended large sums of money in the payment of license fees to the State of Arkansas and in establishing a business therein and in bringing its products and their advantageous uses to the knowledge of customers, and in establishing agencies to secure purchasers for its production.

That it has thereby acquired a good will and busi-

of great value to it if it is permitted to carry on business, but that such value would be destroyed e defendant is deprived of the right to do business is state."

thereupon became entitled to the protection guar-ed to it under the constitution and laws of the e of Arkansas, of which laws the following com-es a part:

"Such foreign corporation shall be entitled to all rights and privileges and subject to all the pen-alties conferred and imposed by the laws of this state upon similar corporations formed and exist-ing under the laws of this state." Kirby's Digest, Sec. 828.

to this permit to do business so granted to the ntiff in error must be read the valid and appropri-enactments of the legislature or the provisions of state constitution then in force, and this authority o business so granted by the state, with the conse-nt acts of the plaintiff in error in reliance there-onstituted a valid and subsisting contract between state and the plaintiff in error, which the state was at liberty to disregard at will as the Supreme Court rkansas intimates in the Hartford case. What was time for which this contract was to run? The stat-of Arkansas imposed no restrictions with respect ne length of time for which domestic corporations be organized. The articles of incorporation pre-d by the incorporators state the number of years ng which the life of the corporation shall continue, it is therefore clear that this contract would exist ng the term of the charter of the plaintiff in error, tever that might be.

Under the terms of the statutes and constitution of the state as aforesaid, a lawful and binding contract having been entered into between the state and plaintiff in error, the construction which the Supreme Court of the State has placed upon Section 1 of the Act in the Hartford case, *supra,* renders it unconstitutional and void, as impairing the obligation of the existing contract between the State and the plaintiff in error. The misconception of the law upon the part of the State Court, as announced in the Hartford case, may be found in the following statement:

> "As the legislature has power to entirely exclude foreign insurance companies from doing business in this state, it can, of course, dictate the terms upon which such companies may do business here. The whole matter rests with the discretion of the legislature."

The power of the state with respect to the granting of a permit before the entering into the contract with a foreign corporation by which the latter may engage in business in a foreign state, is, we respectfully submit, entirely different from the power of the state with respect to the *property rights* of such foreign corporation after it has entered into a valid contract with such corporation whereby it is bound to extend to such foreign corporation the rights and privileges of domestic corporations. We call particularly to the attention of the court the concurring opinion of Mr. Justice Wood, 100 S. W., at page 1198.

The question here presented does not now for the first time receive the consideration of the court. The case of *American Smelting & Refining Co.* v. *Colorado ex rel.,* decided January 7th, 1907, reported in 204 U.

S., 103, seems to be controlling. In that case the right of the Smelting Company to do business in the State of Colorado was forfeited because of its failure or refusal to pay a certain annual state corporation license tax. After the Smelting Company had been doing business in the State of Colorado for some years, on March 22nd, 1902, the legislature of Colorado passed an Act in relation to taxes. Section 64 of that Act provided that all domestic corporations should thereafter pay an annual state corporation license tax of two cents upon each $1,000 of its capital stock. Section 65 provided that every foreign corporation should pay a similar tax of four cents upon each $1,000 of its capital stock, or double the amount of tax required of the domestic corporation. The statutes with which the foreign corporation was required to comply as a condition precedent to its right to do business, were in all material respects the same as the provisions of the statute in the State of Arkansas upon the same subject prior to the passage of the Act in question.

In the course of the opinion Mr. Justice Peckham, says:

> "These provisions of law, existing when the corporation applied for leave to enter the state, made the payment required and received its permit, *amounted to a contract that the foreign corporation so permitted to come into the state and do business therein, while subjected to all, should not be subjected to any greater liabilities, restrictions or duties than then were or thereafter might be imposed upon domestic corporations of like character.* A provision in a statute of this nature, subjecting a foreign corporation to all the liabilities, etc., of a domestic one of like character, must mean that it shall not be subjected to any greater

liabilities than are imposed upon such domestic corporations. The power to impose different liabilities was with the state at the outset. It could make them greater or less than in case of a domestic corporation, or it could make them the same. Having the general power to do as it pleased, when it enacted that the foreign corporations upon coming into the state should be subjected to all the liabilities of domestic corporations, it amounted to the same thing as if the statute had said the foreign corporations should be subjected to the same liabilities. In other words, the liabilities, restrictions and duties imposed upon domestic corporations constituted the measure and limit of the liabilities, restrictions and duties which might thereafter be imposed upon the corporation thus admitted to do business in the state. It was not a mere license to come into the state and do business therein upon payment of a sum named, liable to be revoked or the sum increased at the pleasure of the state without further limitation; it was a clear contract that the liabilities, etc., should be the same as the domestic corporation, and the same treatment in that regard should be measured out to both. If it were desired to increase the liabilities of the foreign, it could only be done by increasing those of the domestic corporation at the same time, and to the same extent. Such being the contract, how long was it to last? Only until the state chose to alter it? Or was it to last for some definite time capable of being ascertained from the terms of the statutes as they then existed? It seems to us that the only limitation imposed is the term for which the corporation would have the right to continue in the state as a corporation. One of the restrictions as to domestic corporations is that it limits the corporate life to twenty years unless extended as provided by law. The same restriction applies to the foreign corporation. (*I. S. M. Co.* v. *Cowie,*

31 Colo., 450.) Counsel for the state concedes that the corporation was admitted for a period of twenty years, but subject to the power of the state to tax. During that time, therefore, the contract lasts. This is the only legitimate, and we think it is the necessary implication arising from the statute. This is not an exemption from taxation; it is simply a limit of the power to tax beyond the rate of taxation imposed upon the domestic corporation. Instead of such a limitation, the act of 1902 already referred to imposes a tax or fee upon, or exacts from a foreign corporation, double the amount which is imposed upon or exacted from the domestic one. The latter is granted the right to continue to do business upon the annual payment of two cents upon each $1,000 of its capital stock, while the former must pay four cents for the same right. *This cannot be done while the right to remain exists.* It is a violation of the obligation of an existing valid contract. *Home of the Friendless* v. *Rouse,* 8 Wall., 430.

Nor is this a case where the power given by the state constitution to the General Assembly to alter, amend or annul a charter is applicable. The Act does not alter the charter or annul or amend it. It simply increases the taxation which up to the time of its enactment had been imposed on all foreign corporations doing business in the state. Holding that the Act of 1902 impaired the obligation of the contract existing between the corporation and the state, and is therefore void as to the corporation, it becomes unnecessary to decide the other questions discussed at the bar."

We are constrained to concede that this court is bound by the construction of the statute adopted by the Supreme Court of the State.

Gatewood v. *N. C.,* decided in this court December 24th, 1906, printed in the Lawyer's Edition Advance

Sheets under date of February 1st, 1907, wherein this court says:

> "It is elementary that under the circumstances we must follow the construction given by the State Court and test the constitutionality of the statute under that view. *Armour Packing Company* v. *Lacy*, 200 U. S., 226; *Smiley* v. *Kansas*, 196 U. S., 447; and cases cited."

Testing the constitutionality of Section 1 of the Act at bar as construed by the Supreme Court of the state, in the light of the principles announced in the Smelting case, *supra*, it clearly impairs the obligation of the contract entered into between the State and the plaintiff in error, and seeks to subject the plaintiff in error to the unequal protection of the law in that it seeks to render the mere innocent act of doing business under the authority conferred by the State, and in full compliance with all other state laws, an offense punishable by the imposition of the enormous penalty of $5,000 per day, without submitting the domestic corporation to the same liability.

The Constitution of Arkansas adopted in 1874 contained as Section 11 of Article 12, the following:

> "Foreign corporations may be authorized to do business in this state under such limitations and restrictions as may be prescribed by law, provided that no such corporation shall do any business in this State except while it maintains therein one or more known places of business, and an authorized agent or agents in the same, upon whom process may be served; and as to contracts made or business done in this state, they shall be subject to the same regulations, limitations and liabilities as like corporations of this state, and shall exercise no other or greater powers, privileges or franchises than may be exer-

> cised by like corporations of this state, nor shall they have power to condemn or appropriate private property."

This provision constitutes Section 824 of Kirby's Digest under the chapter entitled "Foreign Corporations."

By the terms of Section 825 the foreign corporation is required to designate an agent in the state upon whom process may be served.

By the terms of Section 826 it is required to file in the office of the Secretary of State a copy of its charter or certificate of incorporation, duly authenticated, "*and pay into the treasury of the state incorporating and other fees equal to those required of similar corporations formed within and under the laws of this state.*"

Under Section 827 the Secretary of State is required to issue a certified copy of such certificate or charter so filed with him, which shall be taken by the courts of the state as evidence that the corporation has complied with the provisions of the Act referring to foreign corporations, "and is entitled to all the rights and benefits therein conferred."

Section 828 is as follows:

> "And such corporation shall be entitled to all the rights and privileges and subject to all the penalties conferred and imposed by the laws of this state upon similar corporations formed and existing under the laws of this state."

The essentials of a contract between the state and the foreign corporation are all disclosed by these constitutional and legislative enactments upon the part of the state, coupled with the acts of the plaintiff in

error in expending its money, time and energy in establishing and promoting its business in this state, upon the faith and credit which it had given to these constitutional and legislative pronouncements.

The term of the corporate existence of a domestic corporation was fixed at the pleasure of its incorporators without limitation of law, and therefore it follows that the term of this contract between the plaintiff in error and the state was for the life of the charter of the plaintiff in error, provided that during that time it gave obedience to the valid and constitutional laws of the state. The test, however, as to whether it had or had not violated such laws, must be the same as that which would be applied in the case of a domestic corporation, and we contend that under the laws of the State of Arkansas as hereinbefore referred to, the contract between the plaintiff in error and the state could not be abrogated except under such conditions as would justify the forfeiture of the charter of a domestic corporation by *quo warranto* proceedings; it could not be altered or changed unless the proposed alteration applied alike to it and to domestic corporations chartered by the state. In the language of Judge Wood in his concurring opinion in the case at bar:

> "When a foreign corporation has been licensed to do business in a state, it must have the equal protection of the laws. The state can keep it out, but it cannot admit it and permit it to remain and at the same time subject it to money penalties that could not be imposed upon domestic corporations or individuals for the same offense."

The statute at bar, as construed by the State Court,

subjects the plaintiff in error, while operating in the State of Arkansas under a permit or contract which says that it shall be subjected to the same regulations, limitations and liabilities as a domestic corporation, to a liability for the enormous penalties prescribed by this Act, for an *offense committed* by it beyond the borders of the state, whereas there is no such liability imposed upon the domestic corporation; or, adopting the view of the State Court, it imposes a liability for the mere innocent act of doing business on a thoroughly competitive basis within the borders of the State of Arkansas under circumstances which impose no liability upon the domestic corporation for similarly doing business; it subjects the plaintiff in error to the liability for an unlimited search and seizure of its books, papers and documents, without the requirement of any showing of proper cause, and without affidavit, whereas no such liability is imposed upon the domestic corporation; it requires plaintiff in error, at the whim of an Attorney General or the District Attorney of any county of the state, to produce without limit and without safe-guard, its officers, agents and employes, and its books, papers and documents, and submit them to a scrutiny which would disclose all of the secrets of its trade, without any showing as to the relevancy or materiality of such evidence, upon merely the affidavit of the prosecuting officer that he does not know concerning what facts such witnesses will testify, nor what will be disclosed by such books and papers, whereas the domestic corporation is subjected to no such liability.

Another utterly unreasonable feature of the stat-

ute as thus construed, may be illustrated by reference to its possible effect upon interstate commerce. It must be conceded that an agreement between plaintiff in error and others whereby the volume of product entering into interstate commerce for shipment to a given point was curtailed would, coupled with the innocent act of doing business on a strictly competitive basis in the State of Arkansas, constitute a violation of the statute at bar.

The plaintiff in error was a party to the injunction reviewed by this Court in the case of *Swift & Company, et al.* v. *United States,* 196 U. S., 375; 49 La. Ed., 518. This case involved a proceeding in equity under the Sherman Act, and related, of course, exclusively to interstate commerce. The final order of injunction in that case contains the following:

> "But nothing herein shall be construed to prohibit the said defendants * * * from curtailing the quantity of meats shipped to a given market where the purpose of such arrangement in good faith is to prevent the over-accummulation of meats as perishable articles in such markets."

It is, therefore, obvious that the scope of the Act at bar is broad enough to impose a restraint upon interstate commerce, and an agreement relating solely to interstate commerce might be within the exception granted by said injunction order, and therefore be lawful and proper with respect to the commerce affected by such agreement, and nevertheless subject the plaintiff in error to the penalties imposed by this Act for doing business in the State of Arkansas in an otherwise lawful and proper manner, at a time when it was a party to such a lawful agreement with re-

spect to interstate commerce alone. The act should be declared unconstitutional and void, as imposing a restraint upon interstate commerce, if for no other reason.

Am. Ex. Co. v. *Iowa,* 196 U. S., 133.
Way v. *New Jersey Steamboat Co.,* 133 Fed., 188.

(See authorities cited in note to *Gibbons* v. *Ogden,* 9 Wheat., 1, at page 224, Vol. 6, Law. Ed. Sup. Ct. Repts.)

Again, the plaintiff in error might be subjected to the penalties prescribed by this Act for doing business in the State of Arkansas under its contract with the state, while it was a party to an agreement respecting its local trade or commerce in another state or foreign country, where the agreement itself was lawful under the laws of the state or foreign country where such agreement was made and where alone it was effective. The business of the plaintiff in error is worldwide in character. It is well known that the laws of foreign countries, notably England and Germany, differ essentially from the laws generally in force in this country with respect to trade agreements. The Anti-Trust Acts of the several states differ materially, and many of the states have no statute covering such offenses. The plaintiff in error, under the construction of this Act adopted by the State Court, might, therefore, be guilty of a violation of its terms for entering into an agreement in England or Germany with respect alone to the business conducted in such country, which was lawful under the laws of such country; it might be convicted in Arkan-

sas for being a party to an agreement in New York, New Jersey, Colorado, or a number of other states, respecting solely the trade in such state, when such agreement was lawful and proper under the laws of the state whose commerce was alone affected by such agreement. The domestic corporation of Arkansas is subjected to none of these liabilities, and we therefore contend that the construction placed upon this Act by the State Supreme Court impairs the obligation of the contract between the state and he plainiff in error; denies to the plaintiff in error equal protection of the laws, imposes a restraint upon interstate commerce, and is therefore violative of the respective provisions of the Constitution of the United States.

The issue on this branch of the case is sharply drawn and the position of the state is definitely opposite to that of plaintiff in error.

We quote from the Attorney General's brief filed in the State Supreme Court, sufficiently to define the State's position there:

> "The power of the state in pursuance to such a reservation to alter, amend and repeal charters, and by way of so doing to pass statutes imposing new burdens upon foreign corporations, is undoubted. (p. 13.)
>
> It will, therefore, be seen that there is no express limitation upon the power of amendment and control as applied to foreign corporations. They come into the state by grace and remain here at suffrance. (p. 14.)
>
> So long as it acts prospectively the legislature may restrict and guarantee the rights of such corporation to almost any extent, and without regard to whether domestic corporations are restricted in like manner. Having the unlimited power to

> entirely exclude the corporation from the state if it so desires, it can say to it: 'You can no longer do business here unless you do or do not do thus and so. What is past is past. We do not complain of acts which we have neglected to provide against in advance; but hereafter you must yield obedience to this or that exaction or go home.' The prospective character of the enactments is the touchstone. If they are so framed, the corporation has the option to yield obedience or leave the state. If it elects to stay it must obey or suffer whatever penalty is attached to disobedience of the new law."

That this theory of the law was adopted by the State Court in construing Section 1 is obvious from the opinion of Chief Justice Hill in the case of *Hartford Fire Insurance Company* v. *State,* 76 Ark., 303, wherein the Court states the constitutional question to be determined and the answer thereto, in the following language:

> "If the Act reaches to and makes unlawful the transaction of an insurance business in Arkansas by a foreign insurance corporation while belonging to a trust, pool or combination to fix the rates in other places than Arkansas, is the Act unconstitutional, and is it within the power of the State to enact it? * * * In the language of the Lancashire case, the state has dictated these terms upon which foreign insurance corporations can do business in the state. Limiting the decision entirely to the facts before the court, it is held that the state has declared, and possesses the right to declare, that foreign insurance corporations cannot do business in this state while belonging to a pool, trust, combination, conspiracy or confederation to fix or affect insurance rates anywhere."

It would be unconscionable in the extreme for a

state to be permitted to invite the competition of foreign corporations within its borders by the passage of fair laws, reasonable restrictions and just requirements, and after it had thereby induced a foreign corporation to embark in business within such state, undergoing in that process immense expense in the way of establishment of new plants or branches and the building up of a trade, to then hold that the state still has the reserve power to enforce all of the unreasonable or unjust exactions that it might see fit; and that the foreign corporation, because it has ventured beyond the state of its original incorporation, is beyond the pale of the Constitution, and has no recourse but to yield to the unreasonable exactions, without the power to test their constitutionality in the same manner as would a domestic corporation, or must sacrifice its investments within the state and withdraw from business therein.

This view of the law absolutely ignores the contract between the foreign corporation and the state, and apparently seeks to extend the doctrine of *Paul* v. *Virginia*, 8 Wall., 168, and *Waters-Pierce Oil Company* v. *Texas*, 177 U. S., 29, so that the power of the state with respect to the foreign corporation is the same *after* it has entered into a contract, as it was when the foreign corporation applied to the state for admission and *before* the contract had been *entered into.* The distinction is obvious, and was recognized by this Court in *Smelting Company* v. *Colorado, supra.*

In this connection the case of *Hartford Insurance Co.* v. *Perkins*, 125 Fed., 502, is largely relied upon by

defendant in error. It was a companion case to *Greenwich Ins. Co.* v. *Carroll* in the same Volume, at p. 121. Judge McPherson in the latter case followed *Niagara Ins. Co.* v. *Carroll,* 110 Fed., 816, which Judge Carland in the Perkins case rejected, and held that a foreign insurance company had no constitutional rights so long as the legislation in question acted prospectively. Appeals were perfected in both cases, but the case of *Carroll* v. *Greenwich Ins. Co.* was reached first in this court, and is reported at p. 401, Vol. 199 of the U. S. Supreme Court Reports.

Judge Carland's opinion in the Perkins case was overruled on the point of the right of a foreign insurance company to raise the question, and Judge McPherson's view on that question was sustained. On the merits of the case the Iowa act was held constitutional, and the cause was therefore reversed. In the course of the opinion Mr. Justice Holmes speaking for the Court, says:

> "We assume further that the position of the plaintiffs is not affected by the fact that they are foreign corporations. The Act is in general terms, and hits all insurance companies. *If it is invalid as to some, it is invalid as to all. U. S.* v. *Ju Toy,* 198 U. S., 253. That the requirements of the Act might have been made conditions of foreign corporations doing business in the state is immaterial, since, as we understand the statute, the legislature did not attempt to reach the result in that way. A company lawfully doing business in the state is no more bound by a general unconstitutional enactment than a citizen of the state. *Cargill Co.* v. *Minn.,* 180 U. S., 452."

It is well settled that foreign corporation properly engaged in commerce in a state under a permit, con-

tract or license by the state, is entitled to the equal protection of the law, and can claim the guaranties of the Constitution against the impositions of unconstitutional legislation.

Cargyle Co. v. *Minn.*, 182 U. S., 452.
Carroll v. *Greenwich Ins. Co.*, 199 U. S., 409.
Santa Clara County v. *So. Pac. Ry. Co.*, 118 U. S., 394.
Charlotte, etc. Ry. v. *Gibbs*, 142 U. S., 386.
Covington, etc. Co. v. *Stanford*, 164 U. S., 578.
Mo. Pac. Ry. v. *Mackey*, 127 U. S., 209.

In the case last cited, the Court says:

> "Such legislation is not obnoxious to the last clause of the Fourteenth Amendment if all persons subject to it are treated alike under similar circumstances and conditions, in respect both of the privileges conferred and the liabilities imposed. It is conceded that corporations are persons within the meaning of the amendment."

It is obvious from the language used that if all persons subject to the law are not treated alike under similar circumstances and conditions, with respect both of the privileges conferred and the liabilities imposed, it would be held obnoxious to this clause of the Fourteenth Amendment.

The right of the foreign corporation to protection under the Constitution was considered by this court in the case of *Cargyle Co.* v. *Minn.*, 180 U. S., 452, in the following language:

> "The defendant, however, insists that some of the provisions of the statute are in violation of the Constitution of the United States and if it obtain the required license it would be held to have

accepted all of the provisions and (in the same words of the statute), 'thereby to have agreed to comply with the same.' The answer to this suggestion is that the acceptance of a license in whatever form will not impose upon the licensee an obligation to respect or to comply with any provisions of the statute or with any regulations prescribed by the State Railroad and Warehouse Commission that are repugnant to the Constitution of the United States. A license will give the defendant full authority to carry on its business in accordance with the valid laws of the state and the valid rules and regulations prescribed by the Commission. If the Commission refused to grant a license, or if it sought to revoke one granted because the applicant in the one case or the licensee in the other, refused to comply with statutory provisions or with rules or regulations inconsistent with the Constitution of the United States, the rights of the applicant or the licensee could be protected and enforced by appropriate judicial proceedings."

From these authorities and many others which may be found cited therein, we deduce that this plaintiff in error, under the Constitution and Statutes of Arkansas is entitled to the protection of the laws equal with a domestic corporation; that this plaintiff in error is entitled to have the same tests as to the constitutionality of the Act with respect to the provisions of the Constitution of the United States as though it were a domestic corporation; and that the treatment accorded to it under the Act must be equal with the treatment accorded a domestic corporation.

We do not claim for plaintiff in error any *exemption* from any lawful requirement which the State of Arkansas may constitutionally impose upon plaintiff in error as well as other corporations, both foreign

and domestic, either by way of taxation of its *property* or under general legislation enacted by virtue of the police power of the state. Our sole contention in this respect is that having by the initial contract conferred upon the plaintiff in error the right "to do business" within her borders, and having fixed and received the consideration agreed upon by that contract, the state cannot now violate, impair or alter said contract by way of imposing new burdens directed alone against foreign corporations, as an added condition with which plaintiff in error must comply in order to receive the benefits for which it has already paid. The state cannot now violate, impair or alter the contract to the extent of demanding and receiving a new and additional consideration or compensation for a right which has already been granted to the plaintiff in error, and for which it has already paid.

Neither does the plaintiff in error deny that in the first instance it may have been within the right and power of the State of Arkansas to either withhold from foreign corporations altogether the right and privilege to do business within her borders; or if she chose to admit them, to charge any price she might choose to fix for the granting of that right and privilege. The state, however, exercised her election in this matter, and determined to grant to foreign corporations the right to do business upon the payment of a consideration which she arbitrarily fixed, and which foreign corporations desiring to operate in this state were compelled to pay, or to remain outside. Determined by the standard fixed by the state the

price which the plaintiff in error was required to pay for the right to do business in said state, was fixed by the Arkansas Statute at the *equivalent of the amount paid for the incorporation fee of a domestic corporation.* It mattered not if the foreign corporation operated but a small branch in the State of Arkansas and employed but a few thousand dollars of its capital therein. If it desired to do business in the state it must, as a consideration for such right, pay the full amount of the franchise fees required for the organization of a domestic corporation, upon the total amount of its outstanding capital stock. It may be that it was within the right and power of the state at this time to have fixed the price at any sum she chose. When the plaintiff in error took under consideration the question of doing business in the State of Arkansas, it naturally and necessarily took into consideration and gave controlling influence to the question of whether it could afford or was willing to pay the price then placed upon that right and privilege. After due consideration plaintiff in error determined that it would pay the price then demanded. It fully understood that into the contract which it then and thereby entered into with the state must be read the valid and existing laws of the state then in force respecting the conduct of its business within the state, but it cannot be said that had the price of its right to do business in the state then involved, as a part of the consideration, the elements embraced within this statute, its decision would have been the same. It is more than probable that it would have then considered that the privilege and right to do business in the State of Arkansas was not worth the price

sought to be exacted therefor. Relying upon the grant so made to it under the then existing laws of the state, for which it had paid the price then exacted by the state, the plaintiff in error invests its capital and energy, establishes branches, and, we submit, has definite vested rights which cannot thereafter be taken away by the imposition of new conditions sought to be justified solely upon the claimed right of the state to impose such conditions as it sees fit upon the right of the foreign corporation "to do business" under a contract for which it has already paid.

> "The obligation of the contract implied in the grant of a corporate charter will be impaired by a law passed subsequent to the acceptance of the charter annulling the corporation, that is, taking its charter life; taking away any of the franchises conferred by the charter; *imposing burdens on the corporation itself as a condition to the further exercise of its corporate rights;* or imposing additional burdens on corporate stockholders either as to business before or afterwards transacted." 15 A. & E. Encv. Law (2nd Ed.), p. 1049.
>
> "An act of incorporation authorizing the building of a toll bridge across a navigable river, with two suitable draws which shall be at least thirty feet wide, constitutes, when accepted, a contract between the commonwealth and the corporation which cannot be affected by a subsequent act requiring the corporation to maintain draws of a greater width."
>
> *Commonwealth* v. *Proprietors of New Bedford Bridge,* 2 Gray, 339.
>
> *Washington Bridge Co.* v. *State,* 18 Comn., 53.
>
> *N. M. Co.* v. *Coon,* 6 Pa. St., 379.

> "The obligation of a contract depends upon its terms and the means which the law *in existence at the time* affords for its enforcement. A law which alters the terms of a contract by imposing new conditions, or dispensing with those expressed, is a law which impairs its obligations." *State Tax on Foreign Held Bonds,* 15 Wall., 300, 320.

Referring to the right to impose a tax upon the franchise of a corporation in addition to the amount originally exacted, this court, in the case of *Gordon* v. *Appeal Tax Court,* 3 How., 133, said (p. 146):

> "But a franchise for banking when bought, a price is paid for the use of the privilege *whilst it lasts,* and any tax upon it would substantially be an addition to the price."

As to the right of a state to impose additional burdens upon corporate franchises, and as sustaining the well-settled proposition that a corporate franchise or the *right to do business* as a corporation amounts to a contract between the corporation and the state, we call to the court's attention the following cases:

Wendover v. *City of Lexington,* 15 B. Monroe, 258.

Attorney General v. *Bank of Charlotte,* 4 Jones Equity (N. C.), 293.

Commonwealth v. *M. & O. R. R. Co.,* 64 S. W., 452.

See also:

Seaboard Air Line R. R. Co. v. *R. R. Com. of Ala.,* 155 Fed., 792.

The power reserved in the Constitution of the State of Arkansas as to amendment, alteration or repeal of

the franchises of corporations, will not in any manner sustain this legislation. The reserve power is expressed in this language:

> "Corporations may be formed under general laws, which laws may from time to time be altered or repealed. The General Assembly shall have power to alter, revoke or annul any charter of incorporation now existing and revokable at the adoption of this Constitution, or that may hereafter be created, whenever in their opinion it may be injurious to the citizens of this State, in such manner, however, that no injunstice be done to incorporators."

If we admit, for the sake of argument only, that this constitutional reservation could be applied to foreign corporations, and involved a reserve power to revoke or annul a franchise to do business in the State granted to such foreign corporation, yet, we submit that by no process of reasoning can it be made to apply to a case where the *right* to do business rests upon a contract with the State, and has been *bought and paid for.* In such a case, even under this reserve power, the right which had thus been bought and paid for could be taken away only for some breach on the part of the grantee of its duties or obligations under the grant, or an abuse of its corporate privileges; and that would necessarily have to be established by some judicial proceeding showing a misuser, whereby it had forfeited the right which had been granted to it. The State, having entered into such contract for a valuable consideration, cannot repudiate it arbitrarily under any such reserve power.

Am. Smelting & Refg. Co. v. *Colo., supra.*

The court will note further the limitation that the

reserve power must be exercised in such a way "that no injustice shall be done to the incorporators," but can it be claimed that an additonal burden may be imposed upon the right to do business which has already been paid for at an agreed price, without injustice? Would it not be an injustice through arbitrary power to demand an additional price for what has already been conveyed for a price then agreed upon?

> "Power to legislate, founded upon such a reservation in a charter to a private corporation, is certainly not without limit, and it may well be admitted that it cannot be exercised to take away or destroy rights acquired by virtue of such a charter, and which, by a legitimate use of the powers granted, have become vested in the corporation."
>
> *Miller* v. *State,* 15 Wall., 497.
>
> *Coast Line R. R. Co.* v. *Savannah,* 30 Fed., 646.
>
> *Erie R. R.* v. *Pa.,* 153 U. S., 628.

All of the questions here discussed were considered by Judge Trieber, sitting in the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas, in the case of *Chicago, Rock Island & Pacific Railway Company* v. *O. C. Ludwig, Secretary of State for Arkansas,* in an opinion filed on the 5th day of October, 1907, on a demurrer to bill of complaint filed therein reported in Vol. 156 Fed., p. 152. In that case, in the language of the Court:

> "The bill charged that complainant was a foreign railway company doing business in the State of Arkansas by virtue of a permit granted to it by the State; that relying thereon it had invested large sums in right of way, stations, etc., in the State of Arkansas; that now the defendant, as

Secretary of State, threatens to forfeit complainant's right to conduct its business as a railroad company in this state, by authority, as he claims, of an Act of the legislature of the State of Arkansas, approved May 13th, 1907, for the reason that the complainant removed a cause instituted against it by a citizen of this State, in one of the courts of the State, to the United States Court for the Eastern District of Arkansas.

The bill then attacks the constitutionality of the Act in so far as it applies to it, upon several grounds which it is unnecessary to set out, the principal ground which, in the view of the court, determines this case, being that its effect is to impair the obligation of a contract, in violation of Sec. 10, Article 1 of the Fourteenth Amendment to the Constitution of the United States. * * *

That the State has the power to prevent a foreign corporation from doing business at all within its boundaries unless such prohibition is so conditioned as to violate the Federal or its own constitution, has been finally determined in *Security Mutual Life Ins. Co.* v. *Prewitt*, 202 U. S., 246, and is now no longer open to question. As stated in the opinion of the Court:

'As the State has the power to refuse permission to a foreign insurance company to do business at all within its confines, and as it has the power to withdraw that permission when once given, without stating any reason for its action, the fact that it may give what some may think a poor reason or none for a valid act is immaterial.'

But on the other hand it is equally well settled that if the State has induced a corporation to enter it by the granting of a franchise, which is in the nature of a contract, then it is protected in the enjoyment thereof by Art. 1, Sec. 10 of the National Constitution, prohibiting any State from passing any law impairing the obligations of a contract. Without citing the numerous authorities

on that subject, it is sufficient to refer to the *American Smelting Co.* v. *Colorado,* 204 U. S., 103, decided at the last term of the Court. Therefore the only thing now left for determination in this case is what acts of a State constitute a contract with a foreign corporation to do business in the State.

The statutes of Colorado construed in that case are not quite as strong as those of this State, for while the statute provided that 'Such corporations (foreign corporations permitted to do business in the State) should be subject to all the liabilities, restrictions and duties which are or may be imposed upon corporations of like character organized under the general laws of this State, and shall have no other or greater powers,' Sec. 499, Mills Ann. Stat. of Colo.), the *Constitution* of this State contains a similar provision (Art. 12, Sec. 11, *supra*). * * *

Since the rendition of the opinion in the American Smelting Co. case, the identical question came before the Supreme Court of South Carolina in *British American Mortgage Co.* v. *Jones,* 56 S. E. Rep., 983, and that Court following the decision of the Supreme Court of the United States, held that 'where a foreign corporation paid the license fee required by the act of 1883 to enable it to do business in the State it cannot be required by the Act of 1904 to pay an additional tax not levied on domestic corporations, such a requirement being an impairment of the contract of admission to do business in the State on the same terms as domestic corporations.'

But assuming that such foreign corporations when entering the State in pursuance of the laws of Arkansas has not become a domestic one, it must still be held that the decision of the Supreme Court in the Prewitt case is limited by the proviso that the revocation of the right of a foreign corporation to do business in a State other than that of its creation must not in any way impair the obli-

gations of a contract entered into by the State with a foreign corporation.

The learned Attorney General of the State appearing for the defendant frankly admitted that the decision of the Supreme Court of the United States on questions of this nature involving a right claimed under a provision of the Constitution of the United States is conclusive, not only on this Court but also all other Courts, including the Supreme Court of the State. But he insists, and very ingeniously argues, that 'if the foreign corporations become entitled to all the rights and privileges of a domestic corporation of like nature, as the Constitution of this State also provides that "it shall exercise no other regular powers, privileges or franchises than may be exercised by a like corporation of this State" it is subject to Sec. 6 of Art. 12 of that instrument, which provides that "the General Assembly shall have the power to alter, revoke or annul any charter of incorporation now existing and revocable at the adoption of this Constitution, or that may hereafter be created, whenever, in their opinion, it may be injurious to the citizens of this State; in such manner however, that no injustice shall be done to the corporators" and, therefore, he proceeds to argue, the legislature has the right to revoke their charter or right to do business in this State as a foreign corporation without stating any reason for its action or what it may think a proper reason."

Assuming, without deciding, that this provision giving to the Legislature the right to amend, revoke, or annul any charters granted by it applies to foreign corporations as well as domestic corporations, and also assuming that the Courts are powerless to inquire as to its reasons, the determination by the Legisltaure being conclusive, still this provision must be taken in connection with the constitutional provision prohibiting the impairment of the obligations of a contract, as the National Constitution provides that 'this Constitution and

the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made under the authority of the United State shall be the supreme law of the land and the judges in every state shall be bound thereby, anything in the constitutional law of the State to the contrary notwithstanding.'

When the corporation entered the State by authority of its laws, it was not, in the language of the Court in the Smelting Company case 'a mere license to come into the State and do business therein upon payment of a sum named, liable to be revoked or the sum increased at the pleasure of the State, without further limitation.

It was a clear contract that the liability, etc., shall be the same as the domestic corporations and the same treatment shall be measured out to both.'

Such being the case, did the power retained by the State to alter, revoke or amend any charter of a corporation authorize the impairment of the obligations of a contract?

It is urged that when the corporation came into the State it knew that its charter could be revoked, as the Constitutional provision was as much a part of the statute authorizing it to enter the State as if included therein.

The framers of the Constitution, composed as it was of some of the ablest lawyers of the State of Arkansas, were, of course, familiar with the provisions of the Constitution of the United States and no doubt knew that to retain the power to revoke it absolutely, regardless of any contract rights of the parties, would be in violation of that instrument prohibiting the States from enacting laws impairing the obligations of contracts, and for this reason added the proviso 'in such manner, however, that no injustice shall be done to the corporators.'

The effect of such a provision was passed upon in *Vicksburg* v. *Water Works Co.*, 202 U. S., 453. But even if it be assumed that the proviso has not that effect, still it cannot in any way affect the

determination of this cause. The contract between the foreign corporations and the State, as declared in the American Smelting Co. case, was 'a clear contract that the liabilities, etc., should be the same as the domestic corporations, and the same treatment should be measured out to both.'

If it was desired to increase the liabilities of the foreign corporation, it could only be done by increasing those of the domestic corporation at the same time and to the same extent.

That the Act of 1907 deprived foreign corporations then doing business in the State under the Acts in force prior thereto, of valuable rights and privileges and imposed on them onerous liabilities of which domestic corporations are not deprived nor have imposed on them, is too clear to require argument. Section 1 of the Act deprives them of the right, without the consent of the other party, to remove any suit or proceeding brought by any one against it in any Court of the State to any Federal Court, or to institute any original suit or proceeding against any citizen of this State in any Federal Court, and as a penalty it forfeits its right to do business in the State. Corporations organized under the laws of the State are not deprived of this privilege or right. They may institute proceedings in the Federal Courts originally or remove such a cause, if, under the Acts of Congress, there is authority to do so. This is a valuable right conferred by Congress in pursuance of the authority of the Constitution of the United States of which the States cannot deprive a citizen or corporation. *Insurance Co.* v. *Moore,* 20 Wallace, 425; *Barron* v. *Burnside,* 121 U. S., 186; *Sou. Pac. Ry. Co.* v. *Denton,* 146 U. S., 202; *Martin* v. *R. R. Co.,* 151 U. S., 673.

Section 3 of the Act requires all foreign corporations, although they have complied with the laws of the State when they entered the State, to pay again heavy incorporating fees, while domestic

corporations chartered before the passage of the Act are not subject to this burden.

It is impossible to distinguish this case from the *American Smelting Co.* v. *Colorado,* and for this reason the demurrer to the bill must be overruled."

III.

IF IT IS SOUGHT TO APPLY THE PROVISIONS OF SECTION 1 TO ALL CORPORATIONS, BOTH DOMESTIC AND FOREIGN, IT IS UNCONSTITUTIONAL AND VOID AS CONSTITUTING A DENIAL OF DUE PROCESS OF LAW AND A DENIAL OF EQUAL PROTECTION OF THE LAWS, CONTRARY TO THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

If this Court reads the opinion in the Hartford case as conceding that as against individuals, partnerships and domestic corporations this Act must fall, and that the effect of the opinion in that case is to sustain it simply upon the theory that because this plaintiff in error is a foreign corporation the Act can be sustained as against it for that reason alone, then the argument contained in this section of our brief is beside the point, and the question is narrowed to a consideration of the constitutionality of the act as so construed. *Armour Packing Company* v. *Lacy,* 200 U. S., 226. We desire, however, to briefly anticipate the contention that the Act, as construed, is not aimed primarily at foreign corporations, and can be sustained as against all corporations, whether foreign or domestic.

Viewed from the standpoint of a general application, the statute provides penalties for acts done and

transactions occurring wholly without the State of Arkansas, and is therefore extra-territorial and void.

The interpretation given by the Act by the Supreme Court of the State characterizes it as an exclusion statute, and we have argued the case upon the hypothesis that it would be so treated by this Court; but if it is not to be regarded as an exclusion statute, but as one of general application, the question which at once suggests itself is: Can the Legislature impose a penalty upon all corporations for acts or transactions occurring entirely without the State? To ask the question is to answer it.

The classes upon which the ban of the laws falls are described as follows:

> "Any corporation organized under the laws of this or any other state or country and transacting or conducting any kind of business in this state, or any partnership or individual or other association or persons whatsoever, who are now, etc."

The words "and transacting or conducting any kind of business in the state" are manifestly descriptive of the classes to which they are allied, to wit: 'corporations organized under the laws of this or any other state or country," and exclude from the terms of the Act corporations organized under the laws of other states not doing business in Arkansas, and corporations organized under the laws of the State of Arkansas not engaged in business therein. These words have no relation to the offense created by the Act. What acts are these classes so described prohibited from committing? The answer is found immediately following the last quotation of the Act:

"Who are now or shall hereafter create, enter into, become a member of or a party to any pool, trust, agreement, combination, confederation or understanding, *whether the same is made in this state or elsewhere,* with any other corporation, partnership, individual or any other person or association of persons, to regulate or fix, *either in this state or elsewhere,* the price of any article of manufacture, etc., * * * or who are now or shall hereafter enter into, become a member of or a party to any pool, trust, agreement, etc., *whether made in this state or elsewhere,* to fix or limit *in this state or elsewhere* the amount or quantity of any article of manufacture, etc. * * * shall be deemed and adjudged guilty of *a conspiracy to defraud,* and be subject to the penalties as provided by this Act."

Manifestly, the entering into of the unlawful agreement is the gist of the offense. It is equally clear that this agreement may be made and entered into beyond the state and it may relate solely to commerce beyond the state, and bear no relation to the trade of Arkansas. It does not require that in the case of a corporation either foreign or domestic the kind of business done in the state should be such as tends to affect the object of the conspiracy, nor does it in any way state or imply that to constitute the offense any act need be done either in the state or elsewhere to effect such object. The element of doing business does not relate to a partnership nor to an individual. A citizen of Arkansas would violate this Act if he entered into an agreement with respect to prices in England to apply solely to transactions in England, even though the agreement were lawful in England, and even though such citizen were not engaged in business of any kind or character in the State of Arkansas.

The clause "and transacting or conducting any kind of business in the state" is not descriptive of the *offense* defined, but of the *classes* to whom the act applies. To hold otherwise would be to make the elements of the offense when committed by a corporation different from what they are when committed by a natural person, and would require less to constitute the offense when committed by a natural person than when committed by a corporation. To give it this construction would be to give the Act a meaning which it is plain the legislature never intended. Under such a construction the elements of the offense when committed by corporations would include doing business in the state, while the same offense when committed by individuals would be complete by the act of confederation alone, without the element of doing business in the State. This result is unreasonable and ridiculous.

It is fundamental that the legislature of the State of Arkansas cannot punish anyone for doing business there in accordance with their laws merely because he may do elsewhere something which if done there would be a violation of their law.

> Cooley's Constitutional Limitations, 7th Ed., pp. 176, 177.

This elementary rule was applied to a case arising under the anti-trust act of Illinois in *People* v. *Butler Street Foundry Company*, 201 Ill., 236. In the course of the opinion the court says:

> "It is fundamental that the legislature of this state is powerless to pass an enactment making an act committed in a foreign state a crime punisha-

ble in that state, or the legislature of a foreign state to pass an enactment making an act committed in this state a crime punishable in this state. It is, therefore, evident that a violation of the statute above set forth in this state cannot be punished as a criminal offense in a foreign state, and that the immunity afforded by the statute is complete against a prosecution under the law of the other states of the Union. *The Anti-Trust Statute of* 1891 *has no extra-territorial effect. While its terms may be broad enough to include trusts, pools, combines, etc., formed with parties residing outside of this state, the courts in construing it must necessarily confine it to those matters upon which the General Assembly has power to act, viz., trusts, pools, combinations, etc., formed within the State of Illinois.*"

The Supreme Court of Arkansas, however, has given no such construction to the Act at bar. See opinion in the Hartford case, *supra.*,

The Anti-Trust Act of Illinois was drawn to the attention of the United States Circuit Court of Appeals in the case of *Chicago Wall Paper Mills* v. *General Paper Company,* 147 Fed., 491. In the course of the opinion the following appears:

"*It is fundamental and elementary that the General Assembly of Illinois has no jurisdiction to provide any punishment for an act done outside of the territorial limits of the state. It cannot project its public policy into another sovereignty.* The dereliction charged against the plaintiff below by the several pleas, inheres in its contract relations with the twenty-one producing companies, whereby is claimed it was intended to suppress competition, restrict the output and arbitrarily fix the price of paper; that this illicit combination culminated in the organization of the plaintiff corporation and the agreement by which it was to

officiate as exclusive sales agent. Thereby the combine became an accomplished fact which, for aught that appears, may not have infringed the public policy of Wisconsin."

Meeting this question squarely, looking at it directly and according to the plain dictates of common sense, this statute as construed by the State Supreme Court is an attempt to punish conduct outside the jurisdiction of the state. Two companies, whether foreign or domestic, conduct competitive businesses in the state. They do their business in exactly the same manner and entirely free from any combine or agreement with others in the like business; but one of them is a party to an agreement with respect to the price at which its products will be sold—say in a foreign country—while the other is not. The statute at bar attempts to punish the former but prescribes no punishment for the latter. The only basis for this difference in treatment grows out of the fact that one has done something outside the state which the other has not done. There is no process of reasoning, however skillful or adroit, that can disguise the fact that this is an effort to punish a party for conduct outside the state. Any other conclusion is the result of forced reasoning which violates the rules of ordinary common sense, and, we submit, cannot command the approval of a fair mind.

Before the one corporation in the case stated entered into the combine abroad to affect prices abroad, both were blameless under this statute; but after one entered such a combine it became liable under the law, while the other was not, although both continued to do their business in the state in exactly the same man-

ner. What, then, constituted the guilt of the offending person? Manifestly its conduct outside the state, and that only.

The Act as construed is an attempt of the legislature to reach beyond the limits of its natural jurisdiction, to impose penalties for acts and transactions occurring wholly without the state, and is therefore extra-territorial and void.

> "The offense or act interdicted by the law is the 'being, creating and entering into or becoming a member of' a trust to regulate or fix prices. That is the 'conspiracy to defraud' of which the parties are adjudged guilty. That is the unlawful act which subjects the parties named in the Act to a penalty. If the act thus made unlawful is not committed in this state, if the trust has no reference whatever to prices in this state, and does not, in any manner, affect persons or property in this state, then the legislature has no power to prohibit, or prescribe money penalties for the commission of, such acts."
>
> *Concurring opinion of Judge Wood* in the case at bar, 100 S. W., 1199.

The dissenting opinions of Judges Wood and Battle in the Hartford case, *supra*, would indicate that the court regarded the fact that the plaintiff in error therein was a foreign corporation, as controlling. We would particularly direct the attention of the court to these opinions, which limitations of space forbid our setting out *in haec verba*. Judge Battle says in part:

> "The effect of the Act, if valid, is to make certain acts done outside of this State penal offenses punishable by fine and forfeiture, which is beyond the power of the legislature. To that extent at least the Act is void and of no effect."

Judge Wood says:

"It is an egregious mistake to suppose that a foreign corporation is guilty of an offense for merely doing business in this state, or to consider the act of doing business as an element of the offense under this law. It would be no more an offense for them to do business than for domestic corporations or individuals to do business. The doing of business by them is not an ingredient of the offense at all. The words 'and transacting or conducting any kind of business in this State' applied to them, are used in the sense merely of *discriptio personarum.* They merely indicate that these corporations are within the legislative jurisdiction because of the fact of their doing business in this State. * * * The court treats the act as a criminal statute and not as an act simply describing conditions upon which foreign corporations may do business in this State. When so treated the construction given by the court in my opinion would render the whole of the first section unconstitutional. For a foreign corporation, having complied with our laws and already doing business in this State, must be treated, under our Constitution and Statutes, as far as the punishment of criminal offenses is concerned, exactly as domestic corporations or other persons are treated. Constitution, Article 12, Sec. 11. Kirby's Digest, Secs. 824, 828.

And who would be so bold as to declare that it is within the power of the legislature to punish individuals or any member of any partnership, association or company, or even domestic corporations, for a mere innocent act of doing business in this State, because such persons might be interested in trusts elsewhere, to affect prices elsewhere, but which acts were perfectly lawful in the state where they were done? Could one of our domestic corporations or one of our own citizens or a citizen of another state who owned stock in a corporation in another state which was in the insurance business, for instance, which corporation or company in another state

was in a trust, not forbidden by the law of that state, could such individual or domestic corporation be punished in this state under this law for selling shoes, groceries or dry goods without any reference whatever to the trust of which he is a member in other states? Certainly not. For such a monstrous doctrine would be contrary to Article 2, Sec. 2 of the declaration of rights in our constitution, securing to all men the "inalienable right of defending liberty and of acquiring, possessing and protecting property"; also Sec. 11 of the same article, forbidding the passage of any law impairing the obligation of contracts. Upon this question Judge Riddick has well said (in the Lancashire case):

'Now, while the legislature can dictate the terms under which corporations of others states can do business here, it does not have control of the citizen. If a merchant in Missouri doing business also in this state, should enter into a pool or combination in Missouri to regulate prices there, but not intended to have that effect in this state, our legislature could not, on that account, prevent him from doing business here, or subject him to a penalty. So, if we adopt the construction contended for by the Attorney General, we must assume as a portion of this statute that the legislature was attempting to do something it plainly had no right to do, and such portion must be treated as unconstitutional and void.' The legislature certainly did not intend for the Act to have the effect that it must have on other classes named in the statute if the construction of the majority is correct as to foreign corporations."

It is interesting to note the above extract from the prior opinion of Judge Riddick, inasmuch as his vote constituted the majority in the Hartford case as well as the case at bar. There are five members of the Arkansas Supreme Court. Judges Battle and Wood have recorded their consistent protest against this legis-

lation in the Hartford case, as well as in the case at bar; Judge Riddick in the Lancashire case is on record as holding that the Act cannot be sustained as against a citizen of Arkansas; and it must therefore be assumed that his affirming vote in the Hartford case and in this case was upon the theory that plaintiff in error, as a foreign corporation, must submit to unconstitutional legislation or leave the state. This question we have covered in the preceding section of this brief.

The offense created by the Act is denominated by the legislature "a conspiracy to defraud."

At the common law it was established long before the Colonies were planted in America that *unlawful confederation or agreement* was the gist of the offense of conspiracy, and that after it was formed no action on the part of the conspirators to accomplish their purpose, was necessary; and such is the common law as it has been adopted by the various states of the Union.

Rex v. *Eccles,* 1 Leach, 274.
U. S. v. *Watson,* 17 Fed., 147; 44 Fed., 898.
10 Century Digest, p. 1130.

In *U. S.* v. *Britton,* 108 U. S., 204, the court says:

> "The offense charged in the counts in this indictment is a conspiracy. This offense does not consist of both the conspiracy and the acts done, but of the conspiracy alone."

See, also,

Comm. v. *Judd,* 3 Amer. Decisions, 57.

These authorities, and many others which might be cited, establish conclusively the principle that the gist of the offense of conspiracy is the unlawful confedera-

tion. This confederation may occur wholly without the state; it may relate to transactions wholly without the state, and it may be lawful according to the laws of the forum in which it is made. It is, therefore, obvious that the Act at bar is an effort of the Arkansas legislature to ingraft their public policy upon the laws of other states; to dictate to corporations doing business in Arkansas what their conduct shall be in other jurisdictions, without respect to the laws of such jurisdictions, and should, therefore, be condemned as beyond the power of the legislature, as unconstitutional and void.

III.

SO MUCH OF SECTION 8 OF THE ACT IN QUESTION AS PURPORTS TO AUTHORIZE THE COURT TO MAKE AN ORDER FOR THE PRODUCTION OF WITNESSES, BOOKS AND PAPERS, IS UNCONSTITUTIONAL AND VOID, AND DID NOT WARRANT THE MAKING OF AN ORDER IN PURSUANCE OF ITS PROVISIONS.

(a) *It subjects the defendant to unreasonable search and seizure of its books, papers and documents, and thereby violates the Fourth and Fourteenth Amendments to the Constitution of the United States.*

(b) *It requires the defendant in a penal or criminal action to give evidence against itself, and the order in this case based thereon is violative of the Fifth and Fourteenth Amendments to the Constitution of the United States.*

Section 8 of this Act may be found on page 9, *ante*. The statute, being penal, should be strictly construed,

and the full protection of the Constitution should be extended to the defendant.

Boyd v. *U. S.*, 116 U. S., 617.

Monongahela, etc., Co. v. *U. S.*, 148 U. S., 325.

Interstate Commerce Co. v. *Britton*, 154 U. S., 479.

The motion of the defendant in error for the appointment of a commissioner to take depositions, etc. (Tr., 9) avers:

1. That sixteen persons named are officers, agents, directors and employes of plaintiff in error.

2. That all of said persons reside without the State of Arkansas, and in or near to the City of Chicago.

3. That defendant in error desires to take the testimony of said persons at the office of L. D. Taylor in the City of Chicago on the 20th day of September, 1906.

4. That all of said persons named are unwilling and hostile witnesses; that the facts as to the management and business methods of the plaintiff in error relevant to the issues in this case and within the knowledge of the said persons are such that relator can have no accurate knowledge of same until opportunity is given him to interrogate the aforesaid persons who have peculiar and sole knowledge thereof; that said persons have in their possession at the Chicago offices of plaintiff in error, numerous books, papers and documents bearing upon the issues in this cause, and relevant to the claim of defendant in error; that the precise description and

nature of these is peculiarly within the knowledge of the aforesaid persons.

5. That because of the hostility of the said witnesses, their peculiar and exclusive means of information and possession of the books, papers and documents necessary in evidence in the cause, etc., it is necessary that their depositions be taken orally.

> "Wherefore, the plaintiff prays that this court make an order for the taking of the testimony of said witnesses and persons orally, and for the production by them to the said defendant of any and all books, papers and documents in the possession of or under the control of said persons, or any of them, relating to the issues in this cause."

Plaintiff in error thereupon filed its motion to require defendant in error to make its request for a commission to take depositions more definite and specific (Tr., 12), and requested that the State be required to set out specifically what she expected to prove by each witness she desired to produce, and also to set out a particular description of any books she desired produced by said witnesses, together with the name of the witness who is to produce them; and further, that she be required to state wherein any of said books so named are material to the issues in this case.

In response to such motion the Attorney General filed his affidavit (Tr., 7) wherein he stated:

> "I am at this time unable to designate and particularly point out the books, papers and documents which will be required in evidence on the execution of the commission which we have in this case requested; that the contents and particular description of said books, papers and documents are matters peculiarly within the knowledge of the defend-

ants and the witnesses whose examination is prayed at said time and place, and that it is impossible and impracticable for me at this time to designate particularly the matters as to which each witness whose testimony is sought to be taken at said time and place can testify, or to frame interrogatories to such witnesses, or to state at this time the substance of his evidence, for the reason that the matters as to which it is sought to examine said witnesses are matters touching the conduct and business of the defendant company, and as to which the defendant and said witnesses have peculiar and sole knowledge."

Thereupon the Court overruled the motion of plaintiff in error to require the State to make her motion for the appointment of a Commissioner more definite and specific (Tr., 13), and ordered that a commission issue to Lyle D. Taylor, Ashland Block, Chicago, Illinois, for taking the testimony of S. A. McClean, Jr., Arthur Meeker, L. A. Carton, K. K. McLaren, Edward Tilden, Arthur Colby, J. Ogden Armour, P. A. Valentine, Louis F. Swift, Edward F. Swift, Edward Morris, Ira N. Morris, Jesse P. Lyman, James D. Standish, Thomas J. Connors and Thomas E. Wilson, "and for the production of any books, papers and documents in the possession or under the control of either of said persons, relating to the merits of said cause *and to any defense therein*, and asking and empowering said Commissioner to examine orally under oath each and all of said persons, or such thereof as may be brought before him for examination; provided that at such examination the witnesses and books aforesaid shall not be required to be produced at any one time in such numbers as to interfere with the operation of defendant's business."

Pursuant to such order the commission issued to Lyle D. Taylor (Tr., 43), and to this commission was attached a copy of the order under which it was issued.

Thereupon the Commissioner served upon the President of plaintiff in error a notice directing it to produce the parties named, together with "any books, papers and documents in the possession of either of said persons, relating to the merits of said cause *or any defense thereunder,*" at his office in the City of Chicago on the 20th day of September, 1906, at ten o'clock A. M. (Tr., 48.) The following proceedings thereupon took place before the Commissioner (Tr., 48):

> "The Commissioner, at the request of plaintiff, calls for the production for examination of J. Ogden Armour and the other witnesses named in the commission in this cause, and said witnesses failed to appear and testify, or produce any books, papers and documents, as shown by letter hereto attached and marked 'Exhibit C.'"

The letter referred to is as follows (Tr., 50):

"*Lyle D. Taylor, Commissioner,*
Ashland Block, City.

Dear Sir,—

Your request upon this Company to produce certain of its officers and employes, with books, papers and documents, before you, to be used as evidence on the part of the plaintiff in the case of the State of Arkansas against this Company, has received the most respectful consideration. The Company cannot concede the right of the Honorable Court whose commission you bear, to make the order under which you act, or your right to make the request referred to. On the contrary, it is of opin-

ion that the request calls upon it to surrender rights in which it is protected by the Constitution of the United States and of the State of Arkansas that are too valuable to be surrendered.

With all respect for yourself and the Honorable Court the Company must decline to comply with the request."

Our contentions in this respect were disposed of by the Supreme Court of the State in this language (Tr., 56):

> "As to whether the order in question was an unreasonable search of appellant's books is not properly before the court under the facts. The order for the production of the books was coupled with an order to produce named witnesses for oral examination, and J. Ogden Armour, one of those named in the order, was the first witness called for oral examination. Instead of producing him or showing inability to do so, the appellant declined *in toto* to obey the order."

This treatment of the issue we respectfully submit to be unfair to plaintiff in error, and not justified by the record. The order entered was single as to the elements embraced therein, and was in no sense divisible by plaintiff in error. The notice served by the Commissioner upon plaintiff in error pursuant to the terms of such order, required plaintiff in error to produce the witnesses named, and the books and papers described, so far as any books or papers were described, at his office at a given hour, under penalty of being defaulted, as provided for in the Act. It would have availed plaintiff in error nothing to produce a part of the witnesses or a part of the books; its failure in the slightest respect would have subjected it to the penalties of the Act just as fully as did its total failure

to comply therewith. The order and notice of the commissioner thereunder in their entirety we submit must stand or fall; and the test is, *did the order as entered by the court and the notice as issued by the Commissioner thereunder, impose a lawful requirement upon plaintiff in error?*

We contend that such statute as purports to authorize this order disregards and violates every principle of justice and reason which controls the courts of England, and which have been uniformly followed by the courts in this country in obtaining evidence from parties litigant in the way of a production of witnesses or papers in the custody of private owners. We submit that an analysis of the section justifies this assertion. We cannot attempt in advance of cases that may bring them out, to make a comprehensive catalogue of the offenses against established usage and the fundamental principles of justice contained in this provision. We will, however, enumerate such as now suggest themselves, in confidence that the future will develop many more if the Act stands.

At the outset we recall to the attention of the Court the rule that when the State goes into the courts for the assertion of its rights, it goes upon an equality with other litigants.

State v. *Morgan*, 52 Ark., 150.
Brent v. *Bank*, 10 Peters, 596.
The Siren, 7 Wall., 159.
U. S. v. *Beebe*, 17 Fed., 41, and cases therein cited.

As disregarding established rules and violating fun-

damental civil rights preserved by the Constitution, we call the Court's attention to the following features in this Section:

1st. That it gives the right to an order for the production of witnesses and papers whenever the attorney against the defendant "desires" it, without showing any probable cause, and without affidavit.

2nd. It requires the court to make the order whenever the attorney requests it; nothing is left to the judgment of the court.

3rd. It requires the court to make the order whenever the attorney against the defendant "desires" it without the necessity of any showing that the witnesses called for have any knowledge, or that the books called for contain any information material to the cause of action stated in the complaint.

4th. It requires the court to make an order for the production of all persons called for by the attorney against the defendant, provided only they are officers, directors, agents, or employes of the defendant, and reside without the state; and it requires the court to order generally the production of all books, papers and documents in the control of all such persons, provided only that they relate *"to the merits of the suit or to any defense therein."* This might compel the production of every employe and paper of the defendant when none, or less than one-tenth of them, was necessary.

5th. It requires the order to be made whenever the attorney against the defendant desires it, although he may not know (as the Attorney General swore in this

case he did not know) a fact that could be proved by any book or witness called for. This sanctions an indiscriminate ransacking of private papers, not to sustain a case made by the complaint, but to find out if any case can be made. It is a "fishing expedition," which has met the universal condemnation of courts as oppressive and hence unreasonable.

6th. The Act says that the order shall call for all books, papers and documents relating to *any defense* to the cause. Such practice has never been permitted either in England or in this country, and can find no sanction outside of the practices of the Inquisition. As the Supreme Court of Illinois said:

> "The facts constituting one's defense 'is his property' which he may disclose at the trial or forever withhold."
>
> *Lester v. People*, 30 Ill., 408.

7th. The statute requires the court to compel the production of the witnesses and papers in aid of the most severe penal action authorized by any statute in this country; when, by the rules that have obtained since constitutional government began, discovery of all kinds has been withheld in aid of penal actions.

8th. The action required under this statute includes the production of individuals who might themselves be subjected to the penalties of the Act, and might well refuse to attend upon defendant's request. The Act contains no grant of immunity to individuals whose testimony may be required thereunder.

9th. The production authorized under the act might take every officer, agent and employe of the defend-

ant, with all of its books and papers, and thus embarrass, suspend or ruin its business. The statute provides for an order that calls on the witnesses to produce all the books, papers and documents *"material to the issues of the cause or to any defense therein,"* and that was the order made in this case without any other identification of the books, etc.; this seeks to compel each witness to go through all of his personal papers or all papers of the corporation in his control, and through the complaint and answer in the case, in order to ascertain what the issues are and what papers he has that are material to them. Upon an examination of the issues he would not find a specific averment against the plaintiff in error which would enable him to intelligently decide as to whether certain books or papers were or were not material to the issues. While a court may require a witness in proper cases to appear and disclose what he knows, he cannot call upon him to perform vast work in examining pleadings, books and papers, nor can he require him to look through books and papers to ascertain what he may find to aid the cause of the litigant, nor can the party seeking discovery, as said by Judge Holmes, compel his adversary "to get up his case for him."

Gunn v. *Railway*, 50 N. E., 132.

The statute, as administered under the order of this court, called upon the witnesses to go through their own and defendant's books, papers and documents, without limit as to time, character or contents, to find what is in any or all of them that is material to the issues, and to produce them. This not only demands

the time and labor of each witness, but his judgment, discretion and business capacity, in aid of plaintiff.

11th. The defendant is bound absolutely by the statute to procure the attendance of the witnesses, with books, papers and documents, without any provision for paying the expense of producing them or compensating it for the value of their services; and no provision is made for expediting the hearing or limiting the time during which their attendance can be required, although in a case like this, in which sixteen witnesses and unlimited books are called for at one time, it might well be expected to extend over a considerable period.

12th. The statute authorizes an unlimited demand for the production of books, papers and documents without any provision for guarding their secrecy; the entire contents of said papers are subject to the inspection of all persons in attendance, newspaper reporters, business competitors and the attorneys in the case, absolutely without a showing that all or any part of the books, papers and documents called for contain information material to the issues in the case.

13th. The requirement authorized by the statute is a discrimination between the defendants in an anti-trust suit and all other litigants, and between the plaintiff and the defendant in anti-trust suits. A party to no other suit can be subjected to such a demand; and the defendant in this class of cases is thus exposed when plaintiff is not. A statute which places the parties on such unequal grounds denies the equal protection of the law.

14th. By the terms of this Act the attorneys for the state are given unlimited authority to demand the

production of all the officers, agents, directors and employes of the defendant, with all its books, papers and documents immediately upon the institution of such a suit, without a showing of probable cause, or without affidavit; if any prosecuting attorney in the state, or the Attorney General, or any of the numerous "of counsel" desires to go through the affairs of a business concern, it is only necessary to file an anti-trust suit and then communicate the desire to the court, when the court must make an order and thereby license an unlimited examination of such affairs by such attorneys.

15th. The statute imposes a harsh, severe and oppressive burden on the defendant as a condition to the right to make its defense. This puts a price upon the administration of justice, which is unreasonable and in violation of the Constitution of the State and of the United States, which guarantee to everyone the right to obtain justice freely and without price.

16th. We respectfully submit that a careful reading of the statute leads inevitably to the conclusion that it authorizes an "unreasonable search and seizure" of the defendant's books and papers. No argument can strengthen it. If any thing is needed to display the full proportions of the wrong authorized, the proceedings in this cause had in pursuance of the statute requiring the defendant to produce at one time and place sixteen individuals, some of whom were officers or agents, with its books, papers and documents, without identification except that they be material to the issues in the case or to its defense, when those issues give no guide to an identification, and

that done upon an affidavit of the Attorney General that he could not state a single fact within the knowledge of any one of the sixteen witnesses, or a single iota of the contents of any book, paper or document that is material, to the issues, completes the picture and displays this statute as indifferent to all of the guaranties of personal rights and civil liberty contained in the Constitution of the United States, and particularly the Fourteenth Amendment thereto.

In the determination of this question the fact that plaintiff in error was doing business as a foreign corporation is utterly immaterial.

Ellis v. *Ry.*, 165 U. S., 153.
Cargill Co. v. *Minn.*, 180 U. S., 452.

That such is the law is conceded by the Supreme Court of the State. (Tr., 57.)

In *Hale* v. *Henkle*, 201 U. S., 43, it is held: first, that a corporation is entitled to immunity under the Fourteenth Amendment against unreasonable searches, or seizures; second, that an order for the production of books and papers may constitute an unreasonable search and seizure; and third, that an order calling for the production of a large mass of books, papers and documents not shown to be material is an "*unreasonable search and seizure.*"

Mr. Justice Brown, speaking for the court, says:

> "We do not wish to be understood as holding that a corporation is not entitled to immunity under the Fourth Amendment against unreasonable searches and seizures. A corporation is, after all, but an association of individuals under an assumed name, and with a distinct legal entity. *In organizing as a*

collective body it waives no constitutional immunities appropriate to such bodies. Its property cannot be taken without compensation. It can only be proceeded against by due process of law, and is protected under the Fourteenth Amendment against unlawful discrimination. Corporations are a necessary feature of modern business acitivities, and their aggregate capital is becoming the source of nearly all great enterprises.

We are also of the opinion that an order for the production of books and papers may constitute an unreasonable search and seizure within the Fourth Amendment. While a search ordinarily implies a quest by an officer of the law, and a seizure contemplates a forcible dispossession of the owner, still, as was held in the Boyd case, the substance of the offense is the compulsory production of private papers, whether under a search warrant or a *subpoena duces tecum*, against which the person, be he individual or corporation, is entitled to protection. Applying the test of reasonableness to the recent case, we think the *subpœna duces tecum* is far too sweeping in its terms to be regarded as reasonable. It does not require the production of a single contract, or of contracts with a single corporation, or a limited number of documents, but all understandings, contracts or correspondence between the McAndrews & Forbes Company and no less than six different companies, as well as all the reports made and accounts rendered by such company from the day of the organization of the McAndrews & Forbes Company, as well as all letters received by that company since its organization, from more than a dozen different companies, situated in seven different states of the Union."

The Boyd case referred to in the opinion last cited, is found in 116 U. S., at page 617. The opinion in this case is one of the greatest contributons of all times to the literature of the law expounding and maintaining

the right of the individual against governmental aggression; it is by far the greatest opinion ever delivered upon the exact question of the right to be secure against unreasonable searches and seizures; and it is safe to affirm that the great Judge who delivered it never wrote a greater opinion, and few that equal it. No court, so far as we are informed, has declined to follow it, and all have accepted it as the proper exposition of the law on the subjects embraced therein. The case arose in a suit by the District Attorney against certain property, seeking to forfeit it under the Customs Revenue Laws. An order was made by the District Judge under those laws requiring the claimants to produce a certain invoice. The claimants, in obedience to the notice, but objecting to its validity, and the constitionality of the law, produced the invoice and objected to its reception on the ground that in a suit for forfeiture no evidence could be compelled from the claimants themselves, and also that the statute, so far as it compels production of evidence to be used against the claimants, was unconstitutional and void. The section of the Act in question under which the order was made is, in its essentials, as follows:

> "In all suits and proceedings other than criminal, arising under any of the revenue laws of the United States, the attorney representing the Government, whenever in his belief any book, paper, etc., belonging to or under the control of the defendant, will tend to prove any allegation made by the United States, may make a written motion particularly describing such book, paper, etc., and setting forth the allegation which he exjects to prove thereby; and thereupon the court may issue a notice to the defendant to produce such book,

> paper, etc., and if the defendant shall fail or refuse to produce such book, paper, etc., in obedience thereto, the allegation stated in said motion shall be taken as confessed."

The court will note how carefully the rights of the parties were safeguarded by this Act and how much farther it went in that respect than the Act at bar.

1st. The books, papers, etc., desired by the United States were required to be "particularly described."

2nd. The averments which he expected to prove thereby were required to be set forth.

3rd. If the defendant failed or refused to produce the documents, only the averments stated in the motion were to be taken as confessed, and the defendant was in no sense precluded from any constitutional defense which he might have.

The court sets out the Act of 1789 requiring parties to produce books or writings in their possession or power "which contain evidence pertinent to the issue *in cases and under circumstances where they might be compelled to produce the same by ordinary rules of proceeding in Chancery,* under penalty of default or dismissal of their suit. Continuing, the court says:

> "A restriction of this proceeding to 'cases and under circumstances where they (the parties) might be compelled to produce the same (books or papers) by the ordinary rules of proceeding in Chancery' shows the wisdom of the Congress of 1789. The Court of Chancery had for generations been weighing and balancing the rules to be observed in granting discovery on bills filed for that purpose, in the endeavor to fix upon such as would best secure the ends of justice. To go beyond the point to which that court had gone may well

have been thought hazardous. Now it is elementary knowledge that one cardinal rule of the Court of Chancery is never to decree a discovery which might tend to convict the party of a crime or to forfeit his property, *and any compulsory discovery by extorting the party's oath or compelling the production of his private books and papers to convict him of crime or to forfeit his property is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purpose of despotic power, but it cannot abide the pure atmosphere of political liberty and personal freedom.* * * *

Reverting, then, to the peculiar phraseology of this Act and to the information in the present case which is founded on it, we have to deal with an act which expressly excludes criminal proceedings from its operation, although embracing civil suits or penalties and forfeitures, and with an information not technically a criminal proceeding and neither, therefore, within the liberal terms of the Fifth Amendment to the Constitution any more than it is within the literal terms of the Fourth. Does this relieve the proceedings or the law from being obnoxious to the prohibitions of either? We think not; that they are within the spirit of both.

We have already noticed the intimate relation between the two Amendments. They throw great light on each other. For the unreasonable searches and seizures condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man in a criminal case to be a witness against himself, which is condemned in the Fifth Amendment, throws light on the question as to what is an unreasonable search and seizure within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and

papers to be used in evidence against him is substantially different from compelling him to be a witness against himself. We think it is within the clear intent and meaning of those terms. We are also clearly of the opinion that proceedings instituted for the purpose of declaring a forfeiture of a man's property by reason of offenses committed by him, though they may be in civil form, are in every nature criminal. * * *

The information, though technically a civil proceeding is, in substance and effect, a criminal one. As showing the close relation between the civil and criminal proceedings on the same statute in such cases, we may refer to the recent case of *Coffey* v. *U. S.*, 116 U. S., 436, in which we decided that acquittal on a criminal information was a good plea in bar to a civil information for the forfeiture of goods arising upon the same facts. As, therefore, suits for penalties and forfeitures incurred by the commission of offenses against the law, are of this quasi-criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution, and of that portion of the Fifth Amendment which declared that no person shall be compelled in any criminal case to be a witness against himself; and we are further of opinion that a compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit, is compelling him to be a witness against himself within the meaning of the Fifth Amendment of the Constitution; and is the equivalent of a search and seizure and an unreasonable search and seizure within the meaning of the Fourth Amendment. Though the proceeding in question is divested of many of the aggravating instances of actual search and seizure, yet, as aforesaid, it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegiti-

mate and unconstitutional practices get their first footing in that way: namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of persons and property should be liberally construed. A close literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen and against any stealthy encroachments thereon. Their motto should be *obsta principiis*. We have no doubt that the legislative body is actuated by the same motives, but the vast accumulation of public business brought before it sometimes prevents it on a first presentation, from noticing objections which become developed by time and the practical application of an objectionable law."

It will be noted that the court in the Boyd case considers the Act of Congress therein involved as being contrary to the terms of the Fourth and Fifth Amendments, and it may be contended that his case is thereby robbed of some of its authoritative value by reason of the fact that these amendments are restrictions upon the Federal power, and do not operate as limitations upon state legislation. The Fourteenth Amendment, however, passed shortly after the close of the civil war for the specific purpose of imposing a limitation upon the legislative power of the states, practically embraces the substantial provisions of the Fourth and Fifth Amendments.

In *Martin ex parte*, 13 Ark., 206, 207, the court held that fundamental rights were not dependent on the constitution, and that property could not be taken for public use without compensation, even though the con-

stitution contained no provisions to that effect. The Fourth and Fifth Amendments to the Constitution of the United States do not purport to confer or even to enlarge any private right. They but recognize rights as existing, and provide for their protection against encroachment of the Federal government. Then the Fourteenth Amendment was passed, recognizing the existence of the same rights, and providing for their protection against action by the states. The language of the Fourth and Fifth Amendments is specific, while that of the Fourteenth is general. But the guaranty of due process of law in proceedings to affect one in his life, liberty or property, was a guaranty against all those practices that were not due process of law, but invasions of the right of personal security, such as unreasonable searches and seizures, and compulsory self-incrimination.

This effect of the Fourteenth Amendment was insisted upon in the Spies case, 123 U. S., 131; and the court, without deciding the question, assumed it to be correct.

In *U. S.* v. *Hale,* 26 Fed. Cases, p. 81, Justice Woods considered this question. He said the rights protected by the Fourteenth Amendment against state action were the "fundamental rights," and included all rights expressly secured to the people in the constitution, either against the action of the Federal or the State government.

In *O'Neil* v. *Vermont,* 144 U. S., 363, Justice Field in a dissenting opinion stated that rights secured by the first ten amendments against Federal invasion were secured by the Fourteenth Amendment against

State invasion. Justices Harlan and Brewer expressed the same opinion, page 370. And a different opinion on this question was not indicated by the majority.

In *West* v. *Louisiana*, 194 U. S., 264, the court held that the fundamental rights were those protected by the Fourteenth Amendment.

In *Ry.* v. *Chicago*, 166 U. S., 234-241, the court held that the Fourteenth Amendment afforded protection against the taking of property without compensation, under the authority of state governments.

The right of personal security is as fundamental as the right of property, and is so recognized in the constitutions, State and Federal. That it is such plainly appears from what Judge Cooley says upon the subject.

Hibben v. *Smith*, 191 U. S., 310, 325.
Cooley's Con. Lim. (6th Ed.), pp. 364, 373.

That plaintiff in error, as a corporation, is entitled to the immunity guaranteed by this constitutional amendment was conclusively determined by this court in the case of *Hale* v. *Henkle*, 201 U. S., 43, 76; and we therefore urge upon this court that the questions raised as to the constitutional rights of plaintiff in error must be decided in this case with reference to the rules applicable to natural persons; and the Boyd case, as to the questions arising in this case should stand in all respects without limitation by any later opinion.

Two questions of great interest here suggest themselves:

1st. Is a corporation within the protection of the Fourteenth Amendment as to an *unreasonable* search and seizure?

2nd. Is a corporation entitled to the protection of the Constitution with respect to being compelled to produce evidence to incriminate itself?

The case of *Hale* v. *Henkle, supra,* with the long line of unbroken authorities therein referred to, conclusively settles that the first question may be answered in the affirmative.

Certain portions of the language used by Mr. Justice Brown in his opinion in the same case, it may be contended, tend to answer the second question in the negative. The question, however, was not properly at issue in that case, and a decision thereof was not necessary to a determination of the case. The question then being determined was whether or not the officer of the corporation, charged with the custody of certain books and papers of such corporation, could plead criminality of such corporation as a reason for refusal to produce the books. As this court said:

"To state this proposition is to answer it."

The officer in question, under *subpoena duces tecum* of the court, was protected by a broad and sufficient immunity statute which extended to him the equivalent of his constitutional protection. It was held and finally determined, that immunity is a personal privilege and can be claimed only with respect to the rights of the person from whom the testimony is sought. No demand was there made upon a corporation for the production of *its own* books and papers; the demand was upon an individual who had such

books and papers in his possession. The question is thus stated by Mr. Justice Brown (p. 70):

> "It is further insisted that while the immunity statute may protect individual witnesses, it would not protect a corporation of which appellant was the agent and representative. This is true, but the answer is that it was not designed to do so. The right of a person under the Fifth Amendment to refuse to incriminate himself is purely a personal privilege of the witness. It was never intended to permit him to plead the fact that some third person might be incriminated by his testimony, even though he were the agent of such person. * * * The question whether a corporation is a person within the meaning of this amendment really does not arise except to answer a bill of discovery, since it can only be heard by oral evidence in the person of some one of its agents or employes. The amendment is limited to a person who shall be compelled in any criminal case to be a witness against *himself;* and if he cannot set up the privilege of a third person, he certainly cannot set up the privilege of a corporation."

In the case of *Interstate Commerce Commission* v. *Brimson,* 154 U. S., 447, and again in the case of *Interstate Commerce Commission* v. *Baird,* 194 U. S., 25, the process involved requiring the testimony of witnesses and the production of books, papers and documents was directed against the witnesses themselves, requiring them to produce documents within their personal custody or control; and in these cases, as in the Henkel case, to have permitted the witnesses to plead the privilege of a corporation would have been, as stated, *supra,* to permit him to plead the fact that some third person might be incriminated by his testimony, and such was never intended even though he were the agent of such

person. It has been held time without number that a corporation is a person within the letter and spirit of the Fourteenth Amendment, and as such is entitled to the shield afforded by its provisions.

Hale v. *Henkle, supra.*
Cargill Co. v. *Minn.,* 180 U. S., 452.
Gulf, etc. Ry. v. *Ellis,* 165 U. S., 150.

That rule being established, no reason can be perceived why the corporation is not entitled to such protection when a demand is made directly upon it, as was done in this case, for the purpose of compelling it to furnish evidence with which to incriminate it.

Such was the conclusion arrived at by the Supreme Court of Pennsylvania in the case of *Logan* v. *Pa. Ry. Co.,* 132 Pa. St., 403, 408, wherein the court held—

(1) That a corporation would be required to produce writings only when a natural person would be; that the rules of evidence for the production of writings are essentially the same in either case. (p. 408.)

(2) That a defendant would be required to produce writings specified in a petition in so far as they were called for to aid a recovery for money had and received, but not in so far as they were called for to aid in the recovery of a penalty. (p. 409.)

(3) That the statute providing for the production of papers was within the scope of Sections 8 and 9 (the search and seizure clauses) of the Declaration of Rights of the Pennsylvania Constitution. (p. 407.)

Mr. Wigmore, in his excellent work on evidence, in Vol. 3, Sec. 2259, says:

> "It is also plain on the other hand, that a corporation, when discovery is sought from it as

such, is to be equally protected from disclosure so far as it is capable of committing a criminal act."

And to the same effect is *People* v. *Western Insurance Co.*, 40 Ill. App., 428.

In *State* v. *Simmonds Hardware Co.*, 18 S. W., (Mo.), 1125, a proceeding was instituted under the Missouri Anti-Trust Act against the Simmonds Hardware Company, charging that the defendant was a corporation organized under the laws of Missouri; and that its managing officers had failed to make answer to a written inquiry of the Secretary of State made under the Act. The Act provided that upon such failure to make answer the charter should be forfeited and the corporation and its officers should be liable to a fine. The court held that the Act was unconstitutional under the provision "that no person shall be compelled to testify against himself in a criminal case."

The word "person" is likewise used in the Fourth and Fourteenth Amendments to the Constitution of the United States, and that it includes corporations when used in these Amendments is settled by a long line of authorities referred to in another part of this brief.

In *Santa Clara Co.* v. *So. Pac. Ry.*, 118 U. S., 394, Chief Justice Waite says:

> "The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution which forbids a state to deny to any person within its jurisdiction the equal protection of the law applies to these corporations. We are all of opinion that it does."

Whatever views the court may entertain with respect to the right of the state upon demand directed against the corporation itself, to extract from it evidence tending to incriminate itself, we return to a discussion of the proposition that in the case at bar the search and seizure contemplated was unreasonable and that it was an unlawful requirement, constituting a denial of due process of law, to seek to require this plaintiff in error, as a condition to its right to be heard in its own defense, to produce its officers, employes or directors, as well as unlimited books and papers, in the manner attempted in this case.

The exaction contained in the order for the production of "books and witnesses" was not only illegal, but in its nature impossible of performance. The statute and the order based on it, rest upon a wholly fallacious conception of the relations of a corporation to its officers, agents and employes. This conception is that the officers, agents and employes of the corporation are its slaves, subject to its beck and command; bound to go when it says so, and to do what it says do; when in fact, they are each and all, from the highest to the lowest, employed to perform some special work, and bound to the corporation no farther than their duty requires in the performance of such work. A free American citizen does not cease to be such merely by entering into the service of a corporation. He still retains all his rights as an American citizen, among them his right to liberty, his right to come and go when and as he pleases, unfettered by the commands of any employer, whether such employer be a corporation or some natural person.

A statute which ignores and disregards this supreme fact in the relation between the employer and the employe, and imposes upon the employer obligations that can only be performed by its violation, is no law, but a mere arbitrary edict, however high may be the source whence it emanates. When promulgated, as in this case, to force the employer to violate the rights of the employe as a condition to the enjoyment by the employer of the right to make a defense in a case in which heavy penalties are sought against it, it is a denial of the equal protection of the laws and is not due process of law, and a judgment entered against the employer because of failure to obey it, constitutes the taking of the employer's property in the amount of the judgment rendered.

Such requirements made of an employer would be against public policy; they would tend to degrade the great army of the employed, upon whose enlightenment, independence, manhood and free spirit the future welfare of the country depends. Slavery has been abolished for all time; peonage is a crime against the Federal Government, and every effort of Government and society is directed to the dignifying of labor and the elevation of the laborer. But the spirit of this statute disregards all these beneficent aims of free government and enlightened society, and seeks to subject the great classes of the employed to the will of their employers, and to destroy the self-respecting, independent spirit of the masses in an irrational pretense of guarding their interests.

An order somewhat resembling the one entered in this case and authorized by this statute, was entered

by the District Court of the United States in Chicago. In that case a preliimnary injunction was asked for, and the complainant wished to have the president of the defendant company appear as a witness before the Commissioner upon the hearing of the preliminary order. The court ordered the defendant "so far as it was able" to cause its president to appear as a witness. He did not appear. The court then fixed a time and place for his appearance, and ordered that upon his failure to do so, a preliminary injunction should issue. He failed to appear, and thereupon the court granted the injunction and asked its master to suspend the proceedings on a motion to quash the service in the case until the defendant should cause its president to appear as a witness. This order was taken on appeal to the Circuit Court of Appeals for the Seventh Circuit, and upon the hearing there, Judge Jenkins, speaking for the entire court, said:

> "The duty of an officer of a corporation is prescribed by law or by the articles of incorporation or the by-laws of the corporation. The power of a corporation over its officers has respect only to the duties to the corporation which the law imposes. We know of no legal duty imposed upon an officer of a corporation to appear as a witness against that corporation, except in obedience to the writ of subpoena of the court duly served upon him. We know of no power in the corporation or any duty devolving upon it, to compel its officer to appear as a witness before a court. We know of no right in a court to compel a corporation to produce its officer as an adverse witness. *The law furnishes ample machinery to procure the testimony of any witness in the service of its writ, and by proceedings for contempt, for disobedience to the writ, or if the witness is*

beyond the jurisdiction of the court, by deposition or upon commission.'' Central, etc., v. *Board of Trade,* 125 Fed., 468.

That the above is a correct statement of the duties of employes to employers and of the authority of the employer to control the acts of the employe outside the scope of the employment, is too plain to need argument or to be susceptible of elucidation. Since the legislature required the defendant to do what it had no authority to do, and since this requirement was made a condition to its right to defend itself against charges of a criminal nature, exposing it to the severest penalties, the statute cannot be accepted as a law in a country of constitutional government, but must be disregarded as an arbitrary edict. The right to be judged by the law of the land according to due process of law and under the equal protection of the laws, is one of the sacred rights of every person or corporation in a free country. It cannot be frittered away or destroyed by any legislature, and when a legislature says to any person "you shall exact unauthorized service of others, you shall subject your employes to your own will, you shall require of them services they have not contracted to perform, you shall cause them to be interrogated with respect of an offense of a criminal nature for which they are extended no immunity, or as a penalty for failure therein you shall not be heard in your own defense against criminal charges, but must, without a hearing, be subjected to a penalty in thousands of dollars"; this, we say, is putting a price on justice, is transgressing the law of the land; it is denying due process of law; denying

the equal protection of the law or denying any protection of the law.

The requirement of the statute is impossible for the further reason that it demands not only that the defendant shall produce the persons called for, but that it must have them testify, that is, answer every question asked them. If the defendant had produced fifteen of the witnesses called for, but had failed as to the sixteenth, its right to defend would have been denied it under the statute; or if it had produced all of them and one had refused to answer some question, the right to make its defense would still have been denied it; and it is important to bear in mind that under the anti-trust statute at bar, as well as under the similar statutes of other states and of the Federal Government, employes or officers participating in violating with it, are equally liable with the corporation; that most of the statutes make the offense punishable by heavy fine and imprisonment; that the offense charged against this defendant would be equally an offense against the Government of the United States under the Sherman Act, if it involved Interstate Commerce, and an offense against the states where the combination was formed and where it was put into effect; further that no officer or employe would likely be able to testify to any fact incriminating the corporation that would not equally incriminate himself.

And, finally, that the statute at bar provides no immunity to either the corporation or the witness against a prosecution based on his own evidence in this state or under the Sherman Act or in any other state where the offense would be punishable. Under such

circumstances, is it not plain that the corporation could not compel its employes to attend and testify if they had any information pertinent to the issue? That an effort by it to enforce such an order would not be successful, and that the effect would not only be to fail to obtain the evidence, but probably to drive its officers and employes from its service, hamper the conduct of its business and do it great injury. Its right to defend itself against charges of a criminal nature cannot be made to depend on conditions so out of its control.

It may be contended with respect to the failure of this statute to provide immunity to those from whom incriminating testimony was compelled, that Section 3087 of Kirby's Digest of the statutes of the State of Arkansas afforded a sufficient protection, and that it was therefore unnecessary to incorporate a specific immunity section in this particular Act. The section in question is as follows:

> "In all cases where two or more persons are jointly or otherwise concerned in the commission of any crime or misdemeanor, either of such persons may be sworn as a witness in relation to such crime or misdemeanor, *but testimony given by such a witness shall in no instance be used against him in any criminal prosecution for the same offense.*"

It will be noted that the immunity provided by this section is no broader than by the act condemned by this court in the case of *Counselman* v. *Hitchcock,* 142 U. S., 547, in which the immunity offered by Revised Statutes U. S., Section 860, was declared to be insufficient. In consequence of this decision an act was passed applicable to testimony before the Interstate

Commerce Commission, and sustained by this Court in *Brown* v. *Walker*, 161 U. S., 591. In these two cases may be found a complete examination of the requirements of immunity statutes, and it is sufficient here to note the language of the court in the Counselman case:

> "A statutory enactment, to be valid, must afford absolute immunity against after-prosecution *for the offense* to which the question relates."

It is not sufficient to relieve the witness of the possibility of using against him the testimony which he gives, but in order for the statute to be the equivalent of the constitutional protection it must protect and guard him against the using of his testimony as the lead to other evidence whereby he could be convicted of the offense largely by means of the testimony which he had given, without in fact using such evidence directly against him. The Arkansas statute in question is clearly insufficient.

No case, we submit, can be produced, wherein has been sustained an attempt to require the production, through officers and agents of a corporation, of the testimony, books and papers of the said officers of such corporation, as well as the books and papers of the corporation itself, under circumstances where no protection is afforded such individuals respecting the evidence required of them.

With respect to what constitutes an unreasonable search and seizure, we quote the following from Cooley's Constitutional Limitations, p. 370:

> "The Fourth Amendment to the Constitution of the United States, found also in many State Constitutions, would clearly preclude the seizure of

> one's papers in order to obtain evidence against him; and the spirit of the Fifth Amendment—that no person shall be compelled in a criminal case, to give evidence against himself—would also forbid such seizure."

The same great expounder of the Constitution says further:

> "We think it would generally be safe for the legislature to regard all of those searches and seizures 'unreasonable' which have hitherto been unknown to the law." (p. 372.)

If we accept the rule as stated by Judge Cooley that all searches and seizures should be regarded as unreasonable which had hitherto been unknown to the law, it is proper to investigate the conditions under which persons have been required to furnish evidence under bills of discovery in Chancery, and under statutes that have been passed by the various legislative bodies in lieu of the bill of discovery in equity.

Such an investigation shows:

1. That the right to have the particular discovery sought, must be submitted to and sanctioned by a court.

> *Owyhee, etc.,* v. *Lentphaus,* 109 Fed., 549.
> *Triplett* v. *Bank,* 3 Cranch C. C., 646.
> *Ex parte Brown,* 4 Mo. App., 494, 496.
> *Id.,* 72 Mo., 97.

2. That the petition for discovery must disclose the matter sought by the discovery, and where production of papers is sought they must be definitely described.

> *Triplett* v. *Bank,* 3 Cranch, C. C., 646.
> *State* v. *Continental Tobacco Co.,* 75 S. W. (Mo.), 737, 743, 749.

State v. *Dist. Ct.*, 71 Pac. (Mont.), 602.
Com. v. *Lottery Tickets*, 5 Cush. (Mass.), 369.
Whitman v. *Weller*, 39 Ind., 519.
2 Elliott on Ev., Sec. 1391, 1396.

3. That the petition for discovery must show that the matter sought by the discovery is material to the cause of the party seeking it, and competent as evidence to be used therein.

Triplett v. *Bank*, 3 Cranch C. C., 646.
State v. *Dist. Ct.*, 71 Pac. (Mont.), 602.
Owyhee v. *Lantphaus*, 109 Fed., 547.
Lester v. *People*, 150 Ill., 408, 418.

4. That a discovery will not be ordered in aid of a "fishing expedition," or to ascertain whether there is evidence.

Triplett v. *Bank*, 3 Cranch C. C., 646.
State v. *Dist. Ct.*, 71 Pac. (Mont.), 602.
Ryder v. *Bateman*, 93 Fed., 36, 43.
Rothwell v. *Bank*, 20 Hun., 517.

5. That a discovery will never be ordered to require a party to disclose his own case or the evidence in support of it, or to get up the case of the party interrogating him.

Gunn v. *Ry.*, 50 N. E. (Mass.), 1032.
Flitcroft v. *Fletcher*, 11 Exch., 543.
Downie v. *Nettleton*, 20 Atl. (Conn.), 977.
1 Pom. Eq. Jur., Sec. 201.
Story's Eq. Jur., Sec. 1490.
Ryder v. *Bateman*, 93 Fed., 31.
Lester v. *People*, 150 Ill., 408, 418.
2 Elliott on Ev., Sec. 1412.

6. That a discovery will never be ordered in aid of an action seeking to enforce a penalty or forfeiture.

Logan v. *Penn. Ry. Co.*, 132 Pa. St., 406.
2 Danl. Chy. Pr., 1557.
Story's Eq. Pl., Sec. 521, 575, 576.
Story's Eq. Jur., 1494.
Boyd v. *U. S.*, 116 U. S., 616, 623, 631.
1 Greenleaf Ev., 451.

7. That all methods of discovery under statutes are but substitutes for the equitable proceeding, by bill of discovery, and that production is required under the statutes only under the same circumstances as it was before.

Ryder v. *Bateman*, 93 Fed., 34, 43.
Downie v. *Nettleton*, 20 Atl. (Conn.), 977.
State ex rel v. *Dist. Ct.*, 71 Pac., 602.
Pye v. *Butterfield*, 5 Bert. & S., 873.
Wilson v. *Weber*, 2 Gray, 558.
Gleany v. *Stedwell*, 64 N. Y., 120, 123.

In *Field* v. *Pope*, 5 Ark., 70, the court said of the statute then in force, that it gave to common law courts the same powers, in petitions for discovery, as courts of equity had exercised. And in *Hill* v. *Cowthon*, 15 Ark., 29, after referring to the case above and to the statute then in force, the court held that a petition for discovery must show that the discovery was material, that the case of petitioner would be difficult or doubtful without it, and that the material facts to be proven by the discovery could not be proven by other witnesses. It then appears that the petition for discovery must show that the matter sought to be discov-

ered is material to the case of the petitioner. And that can only be shown by setting out what facts are within the knowledge of the party of whom discovery is sought, so that the court may see whether they are material or immaterial, relevant or irrelevant, competent or incompetent.

In *Lester* v. *People,* 150 Ill., 408, 418, the court says:

> "A defendant is not required to disclose matters of evidence relied upon in the defense, and thus inform the plaintiff of his case farther than the pleadings show. *Matters purely of defense are the property rights of the defendant, which he may disclose or not, upon the trial.*"

It is also held that an order to produce papers must describe them, and an order to produce all a party's papers material to the issues is unreasonable.

In *Rothwill* v. *Bank,* 20 Hun., 517, the court said:

> "This is evidently what is called a fishing expedition to enable the plaintiffs to discover something, if there be anything worth the discovery. It has been frequently held that such an examination should not be granted. It is manifestly oppressive. * * * The petition on which the order was granted shows that the plaintiffs have no knowledge of any particular entry which they need to see in order to frame their complaint. * * * This is substantially saying that they wish to examine the books of the bank in order to find out whether there may not be some ground or other for a cause of action on which to make out their complaint."

(Order granting discovery was reversed.)

An analogous proceeding, in which production of papers is sometimes sought, is by a search warrant. We call attention to two decisions of the Supreme

Court of Massachusetts, indicating what is necessary in such a proceeding.

In *Com.* v. *Lottery Tickets,* 5 Cush., 369, it was held that a suspicion supported by oath would not warrant a search or seizure, unless, also, such facts are shown as will satisfy the magistrate that the suspicion is well founded. So a description of goods to be searched for as "goods, wares and merchandise," without more particular description, was held bad.

Sanford v. *Nichols,* 13 Mass., 286.

Production is also sought, at times, by *subpoena duces tecum,* and what has been required to obtain production in this way is indicated in *Lee* v. *Angas,* L. R., 2 Eq., 39, where it was ruled, that, where a *subpoena duces tecum* was issued calling upon one to produce "all accounts, and copies or drafts of accounts relating to the receipt of certain forms in which plaintiffs were interested; * * * all copies of letters, etc., * * * all checks and receipts, etc., * * * and all other books, accounts, letters, papers and documents in their possession or power, in any wise relating to the affairs of plaintiff the language of the subpoena was too general for the court to act on.

In *Ex parte Brown,* 72 Mo., 83, 93, the court considered the right to compel obedience to a *subpoena duces tecum,* which called upon a telegraph agent for all telegrams between a number of persons named, and others named, within a period of eighteen months. The court said, that the order came within the section of the bill of rights against unreasonable searches and seizures; that the petition must give a reasonably accurate description of the papers wanted, either by

date, title, substance, or subject, and that it must appear that the papers were material as evidence in a pending cause. The court says:

> "To permit an indiscriminate search among all the papers in one's possession for no particular paper, but some paper, which may throw some light on some issue involved in the trial of some pending cause, would lead to consequences that can be contemplated only with horror, and such a process is not to be tolerated among a free people."

In this case the Supreme Court refer with approval to the dissenting opinion, in the same case, delivered by Judge Lewis in the Court of Appeals. In that opinion, Judge Lewis argues that every order for the production of papers must rest upon the judgment of a court that the very paper called for is material to the issues; and that every order which calls for the production of private papers and their exposure to strangers, without a preliminary showing of materiality and without a specific description, which shall identify the material and leave the immaterial papers untouched, is a violation of the principles of civil liberty.

Section 3111 of Kirby's Digest provides that subpoena *duces tecum* "may issue when the court or judge thereof so directs, requiring the witness to bring with him any book, writing or other thing under his control, which he is bound by law to produce in evidence."

In *Tharp* v. *Paige,* 66 Ark., 229, a party pending the action and before trial, asked the court for a *subpoena duces tecum* requiring a witness to produce all the books of the defendant company. The court de-

nied the motion and upon appeal this was alleged as a ground of reversal. The court said, that the application failed to show in what way the books were to be used as evidence. That it was not the duty of the court to grant the application merely because it was made. And the implication is that the application should show in what respect the books contained relevant and proper evidence.

In *State* v. *Slamon*, 73 Vt., 212, a warrant was issued to search for stolen property. While making the search the officer found on the person of the defendant an incriminating letter which he took and furnished as evidence on the trial of the defendant. The court held that this was a violation of the bill of rights, since the letter was not described in the affidavit for the warrant or in the warrant.

In *People* v. *Western Ins. Co.*, 40 Ill. App., 428, the court held that an insurance company, defendant in a cause, could not be required to produce its books in an action of defendant to recover a penalty, although it was in form a civil action.

In *Boyle* v. *Smithman*, 146 Pa. St., 255, 274, the court held in an action to recover penalties against a coal dealer for failure to post a statement with respect to his business, as required by the statute, that the defendant could not be required to produce his books.

The great care with which the Constitution guards the rights of the individual against searches and seizures, and the definite showing which it requires to be made before a search or seizure can be authorized, is shown in the language, that "no warrant shall issue except upon probable cause, supported by oath or af-

firmation, and particularly describing the place to be searched and the person or thing to be seized." First, there must be "probable cause," that is, a showing of facts that justify the warrant; that it must be sworn to; and finally it must *particularly describe the thing to be seized.* Judge Cooley says, that "the requirement of 'probable cause' intends that evidence of such facts shall be given as shall satisfy the magistrate that the suspicion is well founded, for a suspicion is no ground for the warrant except as the facts justify it." He also holds that a general description of the articles to be seized is insufficient.

Cooley's Con. Lim., p. 368.

From the authorities cited, it will be seen that the same principles have guided the courts in all proceedings to compel discovery from parties to lawsuits.

We have made this review of the authorities in the belief that what is an "*unreasonable*" search or seizure, can be determined only from the practice which has been approved by the courts in the various proceedings in which persons have been required to produce, or submit to a taking, of their papers. Law is said to be "the perfection of reason." Practices that the law has sanctioned since the establishment of constitutional government may be regarded as reasonable within the spirit of constitutional guaranties; but practices that the law has forbidden and discountenanced since constitutional government began must be regarded as unreasonable. So, in determining whether the part of this act which provides for the compulsory production of papers is reasonable or "*unreasonable,*" the only guide is to compare the act with

the rules that have heretofore been recognized as just and right, and ascertain whether it conserves, or disregards, the principles of reason, justice and right reflected in them. If it does, it would seem to be approved by reason; if it does not, it stands condemned as unreasonable. It must be assumed that when the framers of the Constitution provided the guaranty against what was "*unreasonable,*" they intended by "unreasonable" anything that was a violation of the fundamental principles then deemed reasonable or necessary to the enjoyment of civil liberty.

How does the Arkansas statute stand the test of a comparison with the law regulating the compulsory production of papers, as it was enforced in England and in this country when the Constitution was adopted?

We have heretofore adverted to those particulars in which the Act at bar disregards established rules and fundamental civil rights, and we have no hesitancy in stating that many other and additional hardships and inequalities would follow if the unreasonable search and seizure contemplated by this statute be permitted to stand and become ingrafted upon the law of the land.

The industry of counsel for defendant in error has developed no case which may be cited as authority for the procedure contemplated by the statute. No doubt reliance will be placed upon the case of the *State of Missouri* v. *Standard Oil Company,* 91 S. W., 1062, but it falls far short of the necessities of this case. In it, application was made for the production of witnesses and papers, with a tender of all expenses. The

application showed just what it was claimed could be proved by each witness and each paper called for, and the court ordered the production, but that proceeding was in the nature of *quo warranto,* merely to revoke the right of the corporation to do business in the state, and not seeking to recover a money penalty. It was, therefore, civil in nature, as well as in form. The court said that it was not called to decide what action it would take if the order was not obeyed. The case against Simmonds Hardware Company, heretofore cited, was referred to and approved; but it was said that that case was criminal in nature and that the statute then contained no immunity provisions; whereas the case in hand was only to revoke the right to do business, and the statutes then in force contained "broad and deep immunity provisions."

It is plain, therefore, that the case before this court which seeks to recover a penalty and provides no immunity to the defendant nor to the parties from whom testimony is required, comes within the decision in the Simmonds Hardware Company case rather than in the Standard Oil case.

The Supreme Court of the State of Rhode Island, in the case of *State* v. *Brown & Sharp Manufacturing Co.,* 17 L. R. A., 859, held that the Fourteenth Amendment to the Constitution of the United States had no application to corporations. This case is so completely out of line with the decisions of this court that it is unnecessary to comment further than to quote the following foot-note appended in L. R. A.:

> "The decision in the above case that a corporation is not a person within the protection of the

Fourteenth Amendment of the United States Constitution was doubtless made as a minor point in the case without much consideration or examination of authorities. It is plainly in conflict with the authoritative decisions of the United States Supreme Court on that subject, and also with decisions of State Courts, as is shown by cases cited in 14 L. R. A., 585, under the heading 'Corporations,' in a note on constitutional equality of privileges, immunities and protection."

(c) *The Act in question denies the defendant equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States.*

As has been suggested, the method provided by the statute for compelling from a litigant the production of its agents and employes and of its books and papers, to be used as evidence against it, is confined to alleged violations of the Anti-Trust Act, *and in these cases it is not given where the defendant is a natural person unless doing business as a partnership.* The Act reads:

"If the Attorney General or prosecuting attorney desires to take the testimony of any officer, director, agent or employe of any corporation or joint stock association to proceed against it, or in case of a co-partnership any of the members of said co-partnership or any employe thereof, in any court where said action may be pending."

The individual residing in Arkansas with employes, books and papers outside of the state, is exempt from the provisions of this section, whereas those doing business through the medium of a corporation or a partnership are included therein. This feature of the Act alone should condemn it as denying the equal protection of the laws. The method provided by this statute is not applicable to any other kind of a case, and in this

particular class of suits the privilege is confined to the plaintiff. No such advantage is afforded to any other party in any other suit, and it is given to but one party in these suits. By it a means is sought to be provided whereby the State may ascertain every item of information within the knowledge of any officers or employes of the defendant, or contained in any books or papers in the possession of the defendant or its officers or employes, whereas the defendant is required to go to trial under the broad charge that it is a party to a conspiracy in restraint of trade, without any information as to where, when, how or by what means it is claimed the alleged conspiracy was to be effected; without knowledge of the names of the witnesses by whom it is accused, and in utter ignorance of every element of proof in the possession of the state.

The advantage which such a privilege gives to one party over his adversary can hardly be overestimated. There could be no better case to illustrate it than the one at bar.

The complaint, as amended, alleged that on six named dates the defendant conducted business in Arkansas; that on those dates it was a member of a pool, trust or combination with certain other corporations, partnerships, individuals, persons and associations of persons, engaged in similar lines of business to that conducted by it, among them being twenty-four persons including the principal large packers of the country, for the purpose of regulating, fixing and maintaining the price of the commercial products of slaughtered live stock. It did not disclose when the alleged combination was formed, where it was formed, how it was

formed, at what points prices were affected, or in any way disclose what the terms of the transaction were which it was claimed constituted the combination. Proof that the defendant through any one of its agents in any place in the world, had entered into any arrangement with any one of the twenty-four parties named, for the purpose of regulating, fixing or maintaining the price of any one of the numerous food products of slaughtered animals in the smallest market in the most remote and obscure point on the earth would sustain the charge; yet the motion of the defendant to have the complaint made more definite in any of its particulars, was overruled. We submit to the judgment of this court that the complaint as filed would not impart to this defendant the slightest knowledge of what was relied upon to make the case against it. It could not present to the court, to be determined as a question of law, the sufficiency of the facts relied upon to constitute a cause of action, nor could it go into the taking of evidence either before or at the trial, with a sufficient understanding of what was relied upon to enable it to proceed intelligently, or to know what facts it was called upon to disprove, rebut or explain. If no complaint had been filed the defendant could have known no less of the real facts that were relied upon against it than it was able to learn from the most careful reading of the complaint.

Although the defendant could get no definite information with respect to the offense of which it was charged, it had no right to demand of the court an order on the plaintiff for the production of any witness or of any book, paper or document; but by the terms of this stat-

ute the plaintiff is given the extraordinary privilege of calling upon the defendant to produce every person in its employ, whether as officer, director, employe or agent, and all of its books, papers and documents relating to the merits of the suit, or to any defense therein at any time or place that suited the plaintiff, for the purpose of being examined by plaintiff's attorneys as long as they saw fit. It was not made necessary for the plaintiff to show, before having the privilege of examining witnesses and ransacking without limit books and papers, that the witnesses had any particular knowledge material to the issues in the case, or that the books contained matter that was material to the issues; but whenever the attorney for the state desires such production it is only necessary to communicate that desire to the court, and the court must make the order, and give the plaintiff the opportunity, not of establishing the case made in the complaint, but of ascertaining whether by this process of inquisition he cannot obtain from the employes, books and papers of the defendant, facts upon which to base a claim of recovery. This gives every advantage of the severest inquisition, while it withholds all protection usually accorded to the victim of such inquisition by constitutional government, and it gives to the state not only an inquisition within the state, but a roving inquisition, which can go into other states and exercise its function according to the arbitrary direction of the attorney for the plaintiff. Such an advantage was never given one party over his adversary in any other proceeding of which we have ever read in common law courts. If it does not deny to the defendant the equal protection

of the laws to which it is entitled under the Fourteenth Amendment to the Constitution of the United States, it would be difficult indeed to conceive a proceeding that would have that effect.

In *Gulf, etc., Railway* v. *Ellis*, 165 U. S., 150, a case was presented arising under a statute of Texas providing that when any person having a valid claim against a railroad company not exceeding $50, should present that claim and not obtain payment, that if he sued and recovered judgment, he should be entitled to a reasonable attorney's fee. This court, in considering the claim upon behalf of the railroad company that by the provisions of this statute it was denied the equal protection of the laws, said:

> "Considered as a whole it is simply a statute imposing a penalty upon railroad corporations for a failure to pay certain debts. No individuals are thus punished, and no other corporations. The Act singles out a certain class of debtors and punishes them, when for like delinquencies it punishes no others. They are not treated as other debtors or equal with other debtors. They cannot appeal to the courts as other litigants or under like conditions and with like protection. If litigation terminates adversely to them, they are mulcted in the attorney's fees of the successful plaintiff; if it terminates in their favor they recover no attorney's fees. It is no sufficient answer to say that they are punished only when adjudged to be in the wrong. They do not enter the courts upon equal terms. They must pay attorneys' fees when wrong; they do not recover any if right; while their adversaries recover if right and pay nothing if wrong. In the suits, therefore, to which they are parties, they are discriminated against and are not treated as others. They do not stand equal before the law; they do not receive

its equal protection. All this is obvious from a mere inspection of the statute.

It is true the amount of the attorney's fee which may be charged is small, but if the state has the power to thus mulct them in a small amount, it has equal power to do so in a larger sum. The matter of amount does not determine the question of right, and the party who has a legal right may insist upon it if only a shilling be involved. As well said by Mr. Justice Bradley in the Boyd case: 'Illegitimate and unconstitutional principles get their first footing in that way; namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of a right as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen and against any stealthy encroachments thereon.' *While good faith and a knowledge of existing conditions on the part of the legislature is to be presumed, yet to carry that presumption to the extent of always holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminating legislation, is to make the protection clause of the Fourteenth Amendment a mere rope of sand, in no manner restraining state action.* It is well settled that corporations are persons within the provisions of the Fourteenth Amendment of the Constitution of the United States."

The advantage which the claimant was given over the railroad company by that statute was insignificant and absolutely negligible as compared with the advantage given the state over the defendant in these cases. In *Mo. Pac. Ry.* v. *Mackey,* 127 U. S., 209, the

test of equal protection under the laws appears from the opinion of Mr. Justice Field to be whether "all persons subject to them are treated alike under similar circumstances and conditions in respect both of the privileges conferred and the liabilities imposed." The question we are now arguing yields to a ready solution by this test. Whether we regard the liabilities imposed upon the defendant, or the extraordinary privileges accorded the plaintiff, the inequality is glaring. Not content with turning over to the state the employes and books and papers of the defendant, to enable the state to see if it can fish around and make a case that will come within the broad and general allegations of the complaint, the statute requires the defendant to produce evidence upon which it relies in its own defense. This is contrary to all usages in proceedings for discovery, whether in equity or under statutes, and it is an advantage which the plaintiff enjoys, but which is denied to the defendant. We have heretofore referred to those cases in which it is held that when the state goes into the courts for the assertion of its rights it goes upon an equality with other litigants, is subject to the same rules, and is entitled to no greater rights.

This section is a plain discrimination against non-resident corporations, with a thin disguise to conceal it. The inquisitorial feature applies only where the officer, director, agent or employe of the corporation in case a corporation is proceeded against, or a member or employe of a partnership in case a partnership is proceeded against, is without the jurisdiction of the state. This would generally be the case where the defendant was a non-resident, and seldom, if ever, be

the case when the defendant was a resident corporation or partnership. The statute does not apply at all, as we have shown, where the defendant is a natural person, unless in a partnership. When it is taken into consideration that in the proceeding here authorized the Commissioner has all the powers of a grand jury and that the defendant has none of the protection enjoyed in a proceeding before a grand jury, the character and extent of the wrong done by the discrimination is apparent; and we wish to emphasize the fact that the Commissioner is clothed with every power conferred upon a grand jury of the state, and has even larger powers, since he may compel the giving of testimony from the defendant, whereas a grand jury is without such power. Thus defendants that have non-resident officers or employes may be subjected to this proceeding in advance of the trial, and if they fail to obey the order, although obedience may be impossible, they are subjected to a severe penalty; but a defendant in the same case whose agents and employes reside in the state, or who is a natural person, not in a partnership, can be subjected to no such inquisition in advance of a trial, and is liable to no such penalty. It may be said that the statute operates equally upon all within its provisions. We request the court to observe particularly that the statute makes no classification of persons affected by it; that the matter of classification is left to the Attorney General and the prosecuting attorney. They, by bringing suit under the Anti-Trust Act, bring the defendant in such suit within the terms of the Act, and subject it to its harsh provisions. If it be a non-resident it must submit its affairs, business methods, secrets and processes, books,

papers and employes to a public inquisition if the attorney against it desires it, while its business competitors, doing the same business under exactly the same circumstances, are exempt from it. So, if any non-resident engaged in trade in this state escapes an inquisition, it is because the Attorney General and the various prosecuting attorneys fail to ask for it. Its freedom in that respect comes as a matter of favor, not of right. But this is a government of law, not of man; even though the enforcement of the law be entrusted to officers high in the governmental service; and a statute which subjects the rights of the people to the will of individuals is inconsistent with the law of the land.

(d) *The provision under consideration deprives the defendant of its property without due process of law, in violation of the Fourteenth Amendment.*

The statute provides for an order upon the mere demand of the attorney for the state, which compels the defendant to produce all of its employes, officers and agents, and all of its books, papers and documents called for by such attorney. They are to be produced whenever and wherever such attorney desires them, and no limit is fixed as to the time within which they must continue to be on hand; but as they are wanted for the purpose of furnishing evidence the implication is necessary that they are to be kept on hand until the attorney for the state has thoroughly examined the witnesses, each and all of them, and gone entirely through the books and papers and obtained therefrom whatever in his judgment may aid his case or defeat the defense. It is obvious that in the case of a large

corporation doing business throughout the world, as is the defendant in this case, much time would be consumed in such an examination. It is a matter of common knowledge that weeks and even months are necessary to complete such an investigation; but this is not considered. Under the statute, and under the order which the court made in this case in pursuance of the statute, the defendant must have the parties present, with the books and papers, on the day named, and thereafter from time to time indefinitely. The officers and employes of a corporation are paid for their time by the corporation. Its books and papers are necessary for the prosecution of its business. Both the time of its employes and officers and the use of its books and papers are in the most essential sense its property, and the statute requires that this property shall be sacrificed by it to the interests of the state upon the mere demand of the State's Attorney, without limit as to time and without any provision whatever for compensating the losses of the defendant. This is plainly a taking of the defendant's property without due process of law or any process of law known outside the practices of arbitrary inquisition. Whether the loss be little or much is immaterial from a constitutional standpoint in determining the question of right.

Ellis v. *Railway,* 165 U. S., 154.

The attendance of the witnesses under such circumstances, and the carrying back and forth of books and papers, involves a necessary and direct expense outside of and beyond the services of the witnesses and the use of the books; but the statute makes no provision

for paying such expenses. It plainly contemplates that the witnesses may be required to come from their distant homes into this state, and bring with them the books and papers called for, but even under such circumstances no provision is made for the expense, but the defendant is required to bear it under penalty, if it fails, of being denied the right to make a defense. A proceeding so arbitrary and oppressive is authorized by no other statute of which we have any information, and we respectfully submit it as plainly depriving the defendant of its property without due process of law.

IV.

THE SECTION WHICH PROVIDES THAT THE COURT SHALL STRIKE THE DEFENDANT'S PLEADINGS FROM THE FILES AND RENDER JUDGMENT AGAINST IT BY DEFAULT, IS UNCONSTITUTIONAL AND VOID, AND THE JUDGMENT SO RENDERED CONSTITUTES A TAKING OF PROPERTY OF PLAINTIFF IN ERROR WITHOUT DUE PROCESS OF LAW, AND A DENIAL TO IT OF THE EQUAL PROTECTION OF THE LAWS, IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Section 9 of the statute at bar under which these proceedings were had, is set out at p. 10, *ante*.

In approaching the argument of this important branch of the case we ask the court to bear in mind the following propositions which we deem established by the authorities heretofore cited:

1st. This plaintiff in error is a person within the scope and intent of the Fourteenth Amendment.

2nd. When it is assailed in the courts of a state

in which it is doing business as a foreign corporation pursuant to the rights conferred upon it by the state, it is entitled to be adjudged according to due process of law, and is entitled to the protection of the laws equal with an individual or a domestic corporation.

3rd. It is entitled to have the question of whether or not it was denied due process of law and the equal protection of the law, measured by the same tests as would be applied if the plaintiff in error were a domestic corporation or an individual.

With these principles in mind we believe the question yields to a ready solution.

1. The judgment was so rendered after the defendant's demurrer and answer had been stricken from the files, and as a penalty for defendant's failure to comply with the order to produce witnesses and papers; but, as we have argued fully heretofore, the order for such production was illegal; and a failure to comply with an illegal exaction could not subject the defendant to a penalty or prejudice his right to make his defense in the case. This was the conclusion reached in the case of *Georgia, etc.*, v. *Etowah*, 30 S. E. (Ga.), 878, where the court held such judgments to be in the nature of penalties for contempt of court.

2. The court acting in pursuance of the provisions of Section 9 of the statute, denied the defendant the right to be heard in its defense, rendered judgment against it without a hearing, and thereby deprived it of its property without due process of law, and denied to it the equal protection of the laws, in violation of the State Constitution and of the Fourteenth Amendment to the Constitution of the United States.

The purpose of the statute is to require courts to render judgment without a trial, and after denying to the defendant a right to defend. According to the definition of Mr. Webster, in the Dartmouth College case, neither a statute, which is found to work such a wrong, nor the judicial proceeding in which the wrong is to be consummated, is due process of law. His exposition of what is meant by due process of law has been accepted by the courts of the country generally as correct, and it has been quoted more frequently perhaps than any other exposition of any principle in our jurisprudence. It was not accepted as a perfect definition, for it has been recognized that "*due process of law*" could not be defined. But the principles he enunciated have been recognized as furnishing the test by which the question should be determined as it arose in subsequent cases.

In the *Orient Insurance Co.* v. *Daggs*, 172 U. S., 557, 563, Justice McKenna, delivering the opinion of the court, quoted with approval a statement of Justice Brown in *Holden* v. *Hardy*, 169 U. S., 366, as follows:

> "This court has never attempted to define with precision the words '*due process of law*,' nor is it necessary in this case. *It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the union may disregard, as that no man shall be condemned in his person or property without due notice and an opportunity of being heard.*"

Whatever may be the difficulty encountered in reconciling different decisions upon the question of due process of law as it has arisen upon the various states of fact presented to the courts, there is no utterance

in conflict with that above set out. Whether we turn to one case or another upon this question, we find nothing to shake, qualify or limit the statement "that no man shall be condemned in his person or property without due notice *and an opportunity of being heard.*"

Notice is valueless except as it affords an opportunity to be heard. That is the fundamental right, and notice is given only that it may be enjoyed. Notice is but the shadow, while an opportunity to be heard is the substance of the right.

> "The substance and not the shadow, determines the validity of the exercise of power."
>
> *Adams* v. *Postal Telegraph Co.*, 155 U. S., 689, 698.

It is universally held that the appearance of a defendant without notice confers jurisdiction. And it is just as universally held that notice, followed by a denial of the right to defend, does not confer jurisdiction.

The opportunity to defend is the fundamental right whose preservation is essential to due process of law. This appears in almost every discussion of the matter, and is denied in none.

In *Hovey* v. *Elliott*, 167 U. S., 444, Justice White speaks of "the fundamental right of one summoned in a cause to be heard in his defense"; and further says, the right which was here denied by rejecting the answer and taking the bill for confessed because of the contempt, "*involved an essential element in due process of law.*"

In *Bradstreet* v. *Neptune Ins. Co.*, 3 Summ., 601, Justice Story said:

> "It is a rule founded in the first principles of natural justice that a party shall have an opportunity to be heard in his defense, before his property is condemned."

In *Windsor* v. *McVeigh*, 94 U. S., 274, 282, 283, Justice Field said:

> "The legal effect of striking out his appearance was to recall the monition and notice as to him. * * * It was not within the power of the jurisdiction of the district court to proceed with the case, so as to affect the rights of the owner, after his appearance had been stricken out, and the benefit of citation to him thus denied. *For jurisdiction is the right to hear, and determine; not to determine without hearing.*"

In *Galpin* v. *Page*, 18 Wallace, 330, 368, it is said:

> "It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear, *and has been afforded an opportunity to be heard.* Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and can never be upheld where justice is justly administered."

In the case of *Lasere* v. *Rochereau*, 17 Wall., 437, it is said:

> "It is contrary to the plainest principles of reason and justice that anyone should be condemned as to person or property without an opportunity to be heard."

In *Simon* v. *Croft*, 182 U. S., 427, it is said:

> "The essential elements of due process of law are notice and opportunity to defend. In deter-

mining whether such rights were denied, we are governed by the substance of things and not by mere form."

Judge Cooley discusses the meaning of due process of law with the ability and research he displays in the treatment of such questions generally. He says:

"In judicial investigations the law of the land requires an opportunity for a trial; and there can be no trial if only one party is suffered to produce proofs."

Cooley's Con. Lim., p. 452, 6th Ed.

"The party to be affected by the process which deprives him of his life, liberty or property, must have notice of the time and place of hearing, in some form and at some time, and must have the privilege of being heard. He must have his day in court. And a proceeding under a statute of the State of Ohio which did not provide for these things and operated to deprive the party of these privileges, was held unconstitutional, under the Fourteenth Amendment."

Meyers v. *Shields,* 61 Fed., 718.

Judge Sanborn, in *Burton* v. *Platter,* 53 Fed., 901, said:

"It is a principle that lies at the foundation of all just government, that no man shall be deprived of his life, liberty or property without due process of law. Every disregard of this principle by courts, legislatures or citizens tends directly towards distrust, insecurity, disorder and anarchy. It may be difficult, perhaps impracticable, to give a definition of due process of law which would comprehend all cases as they arise, and it is certainly unnecessary to do so. Chancellor Kent says, 'The better and larger definition of the process of law is, that it means law in its regular course of administration through courts

of justice.' Kent's Com., 13. Certain it is that in judicial proceedings due process of law must be a course of legal proceedings according to those rules and forms which have been established for the protection of private rights; it must be one that is appropriate to the case and just to the parties affected; it must be pursued in the ordinary manner prescribed by the law; *it must give to the parties to be affected an opportunity to be heard respecting the justice of the judgment to be sought; it must be one that hears before it condemns; proceeds upon inquiry and renders judgment only after trial.*"

In *Zeigler* v. *R. R. Co.*, 58 Ala., 594, the Supreme Court of the state held an act of the legislature to be void, as denying due process, under the Constitution of Alabama, and used this language:

> "Due proces of law implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty or property, in its *most comprehensive sense;* to be heard, by testimony or otherwise, and to have the right of controverting, by proof, every material fact which bears on the question of right in the matter involved. If any question of fact or liability be conclusively presumed against him, this is not due process of law. We have held that it is within the power of the legislature to declare that certain proofs shall be *prima facie* evidence of specified facts. But, at the same time, we decided that the legislature could not constitutionally ordain that such proofs should be conclusive evidence of material facts in controversy. The first is a mere rule of evidence. The last has been characterized as a 'confiscation of property.' "

In *State ex rel.* v. *Billings,* 55 Minn., 473, the Supreme Court of Minnesota had before it a statute which provided for the confinement of insane persons.

The statute was held not to properly provide for a hearing on the question of insanity, and was held unconstitutional as denying due process. The court said:

> "The first inquiry is as to what is 'due process of law.' In *Baldwin* v. *Collins*, 44 Minn., 97, it was said that no complete or exhaustive definition of the term had ever been attempted by the courts, because it was incapable of any such definition. All that could be done was to lay down certain general principles and apply them to the facts of each case as they arise. Mr. Webster's exposition of the words, 'law of the land' and 'due process of law,' viz., the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial, was quoted; and then the court went on to say that, in judicial proceedings 'due process of law' requires notice, hearing and judgment. These words, said the court, do not mean anything which the legislature may see fit to declare to be due process of law, for there are certain fundamental rights which the legislature cannot disregard in proceedings by which a person is deprived of life, liberty and property, and one of these is, 'notice before judgment in all judicial proceedings.' In commenting upon the difficulty of defining these words, it has been said that it is wisdom to leave the meaning to be evolved by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require. *Davidson* v. *New Orleans*, 96 U. S., 104. *But it may be stated generally that due process of law requires that a party shall be properly brought into court and that he shall have an opportunity, when there, to prove any fact which, according to the Constitution and the usages of the common law, would be a protection to him or his property. People* v. *Board of Supervisors*, 70 N. Y., 228. Due process of law requires an orderly proceeding adapted to the nature of the case, in which the citizen has an opportunity to be heard, and to defend, en-

force and protect his rights. A hearing, or an opportunity to be heard, is absolutely essential. Due process of law without these conditions cannot be conceived. *Stewart* v. *Palmer,* 74 N. Y., 183. It follows that any method of procedure which a legislature may, in the uncontrolled 'exercise of its power,' see fit to enact, having for its purpose the deprivation of a person of his life, liberty or property, is in no sense the process of law designated and imperatively required by the Constitution. * * * *There must be a trial before judgment can be pronounced, and there can be no proper trial unless there is guaranteed the right to produce witnesses and submit evidence.* The question here is not whether the tribunal may proceed in due form of law, and with some regard to the rights of the person before it, but, rather is the right to have it so proceed absolutely secured."

We submit, as a result of the authorities, the following propositions:

First. That no one can be condemned in his person or property, without notice.

Second. That no one can be condemned in person or property, without an opportunity to defend.

Third. That where notice is given and an opportunity to defend is denied, the law treats the notice as withdrawn, and the court is as completely without jurisdiction as if no notice had ever been given.

We call the court's attention to some of its decisions on the subject of due process, beginning with those arising soon after the war and growing out of the conditions of war, and following them down to the latest utterances on the subject.

We ask the court's attention first, to *McVeigh* v. *U. S.,* 11 Wall., 259, 266. The district attorney filed an

information in the district court of the United States for the Eastern District of Virginia, alleging that the defendant, McVeigh, was the owner of property described, that he was guilty of treason and that his property was thereby rendered liable to forfeiture. Due notice was given to the defendant. He appeared, interposed a claim to the property and filed an answer. The district attorney submitted a motion that the appearance, answer and claim should be stricken from the files. An order was made according to the motion. A decree *pro confesso* was subsequently rendered, the property was condemned to be sold, and the defendant appealed.

Justice Swayne, speaking for the court, said:

> "In our judgment the district court committed a serious error in ordering the claim and answer of the respondent to be stricken from the files. As we are unanimous in this conclusion, our opinion will be confined to that subject. The order in effect denied the respondent a hearing. It is alleged that he was in the position of an alien enemy, and hence could have no *locus standi* in that forum. If assailed there, he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice.
>
> Whether the legal *status* of the plaintiff in error was, or was not, that of an alien enemy, is a point not necessary to be considered; because, apart from the views we have expressed, conceding the fact to be so, the consequences assumed would by no means follow. Whatever may be the extent of the disability of an alien enemy to sue in the courts of the hostile country, it is clear that he is liable to be sued, and this carries with it

the right to use all the means and appliances of defense. In Bacon's Abridgment, it is said: 'For, as an alien may be sued at law, and may have process to compel the appearance of his witnesses, so he may have the benefit of a discovery.' "

In this judgment all the members of the court concurred.

Windsor v. *McVeigh,* 93 U. S., 274, 277, 278, arose out of a proceeding to confiscate other property of McVeigh, in which the same action was taken as in the case last cited, except that the property was sold and McVeigh later attacked the title of the purchaser in a collateral proceeding. Justice Field delivered the opinion of the court, and after quoting a part of the language of Justice Swayne, above, said:

"The principle stated in this terse language lies at the foundation of all well-ordered systems of jurisprudence. Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. *A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.*

That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. Until notice is given, the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization over the subject-matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim or the charges made; it is a summons to him to appear and speak, if he has any-

thing to say, why the judgment sought should not be rendered. A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party, appear, and you shall be heard; and, when he has appeared, saying, your appearance shall not be recognized, and you shall not be heard. In the present case, the district court not only in effect said this, but immediately added a decree of condemnation, reciting that the default of all persons had been duly entered. It is difficult to speak of a decree thus rendered with moderation; it was in fact a mere arbitrary edict, clothed in the form of a judicial sentence.

The law is, and always has been, that whenever notice or citation is required, the party cited has the right to appear and be heard; and when the latter is denied, the former is ineffectual for any purpose. The denial to a party in such a case of the right to appear is in legal effect the recall of the citation to him."

It was accordingly adjudged, that the sale was a nullity and subject to be attacked collaterally.

In *Hovey* v. *Elliott,* 167 U. S., 409, a suit had been brought in the Supreme Court of the District of Columbia to set aside a fraudulent conveyance and subject property alleged to have been fraudulently conveyed to the payment of the demand of the plaintiff. The defendant filed an answer, alleging facts, which, if found true, would have defeated the recovery by the complainants. The complainants obtained an order of the court, requiring the defendants to pay into the registry of the court the sum of money which it was claimed they had fraudulently obtained. They failed to make the pay-

ment required. The court then adjudged them guilty of contempt and directed, that unless they should pay the money into the registry of the court within six days, their answer should be stricken out and the cause should proceed as if no answer had been filed. The payment was not made, the answer was stricken from the files, and a decree *pro confesso* was entered. Subsequently a suit was brought in New York upon this judgment. The Court of Appeals of New York held that the judgment was not enforcible in the courts of that state, because it was rendered for a contempt and the courts of the District of Columbia were of limited jurisdiction and without authority to render the judgment by way of punishment for contempt. The case was taken to the Supreme Court of the United States on the ground that the courts of New York denied to the judgment proper faith and credit. Justice White delivered the opinion of the Supreme Court, and it is a thorough, complete and admirable review of authorities, and is a masterful exposition and statement of the fundamental right of a defendant to be heard before his property can be taken. It is so convincing and conclusive that nothing is left to be said, and courts have since referred to it as placing the questions therein determined beyond the pale of controversy. He waives the question, as to whether the authority of the courts of the District of Columbia was limited or general, and assumes that they had general powers to punish for contempt, and proceeds to consider what he denominates a "*more fundamental question,*" to-wit: "Whether courts having plenary powers to punish for contempt, have the right to summon a defend-

ant to answer, and then, after obtaining jurisdiction by the summons, refuse to allow the party summoned to answer, or strike his answer from the files, suppress the testimony in his favor, and condemn him without consideration thereof, and without a hearing, on the theory that he has been guilty of a contempt of court." Upon the question as stated, he says:

> "The mere statement of this proposition would seem, in reason and conscience, to render imperative a negative answer. The fundamental conception of a court of justice is condemnation only after hearing. To say that courts have inherent power to deny all right to defend an action and to render decrees without any hearing whatever is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, and hence to strip it of that attitude of justice upon which the exercise of judicial power necessarily depends. * * *
>
> Can it be doubted that due process of law signifies a right to be heard on one's defense? *If the legislative department of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an enactment would not be violative of the Constitution? If this be true, as it undoubtedly is, how can it be said that the judicial department, the source and fountain of justice itself, has yet the authority to render lawful that which, if done under express legislative sanction, would be violative of the Constitution?* If such power obtains, then the judicial department of the government sitting to uphold and enforce the Constitution is the only one possessing a power to disregard it. If such authority exists then, in consequence of their establishment to compel obedience to law, and to enforce justice, courts possess the right to inflict the

very wrongs which they were created to prevent. * * *

It being, therefore, clear that the Supreme Court of the District of Columbia did not possess the power to disregard an answer which was in all respects sufficient and had been regularly filed, and to ignore the proof taken in its support, the only question remaining is whether a judgment based upon the exercise of such an assumed power is void for want of jurisdiction, and may therefore be collaterally attacked. It cannot be doubted that where a judgment is rendered without the issuance and service of summons against a party who did not enter an appearance, the court rendering it is without jurisdiction to do so, and it can be assailed as void whenever presented as a muniment of right against another. Looking at the substance and not the form of the decree in the case of *Hovey* v. *McDonald,* upon which the rights of the plaintiff in error depend, it is plain that the judgment was substantially one without a hearing, for of what efficacy or avail was the summons to appear when the court which issued the summons rendered its judgment upon the theory that the summons was inefficacious, and that the defendant had no right either to appear or to be heard in his defense? As said by this court in *Adams* v. *Postal Telegraph Cable Co.,* 155 U. S., 689, 698: 'The substance, and not the shadow, determines the validity of the exercise of the power.' * * *

There is no distinction in principle between determining a cause upon issues not raised by the pleadings in the actual absence of the party, and rendering a decree by refusing to permit a defendant to be heard in his defense or to consider the merits of a sufficient defense, and, indeed, by striking the pleading containing such defense from the files."

The court held that the judgment was a nullity and entitled to no faith or credit.

In *Hovey* v. *Elliott,* Justice White says that but two cases were cited which in any way sustained the action of the court of the District of Columbia in striking the answer and rendering judgment by default; and that they were *Walker* v. *Walker,* 82 N. Y., 260, and *Pickett* v. *Ferguson,* 45 Ark., 177, 191. With respect to the former, he reviews the authorities upon which it is placed and says it is manifest that the decision finds no support in them. With respect to the latter, he says that it accepted the doctrine of the former, without any review of the authorities; but he adds, that both the trial court and the Supreme Court shrank from enforcing the doctrine to its logical consequences.

Since *Hovey* v. *Elliott* was decided, the courts of New York have accepted it as correct, and no longer follow *Walker* v. *Walker.* In *Sibley* v. *Sibley,* 76 App. Div., 132, 135, the lower court struck defendant's answer and rendered judgment for failure to obey an order to pay alimony. The judgment was reversed, under the rule in *Hovey* v. *Elliott,* and *Walker* v. *Walker* was disregarded.

In *Pickett* v. *Ferguson,* 45 Ark., 177, 191, the plaintiff had brought a suit to redeem lands in Tennessee, and later brought a similar suit in Arkansas. The defendants filed a cross-complaint in the Arkansas suit and obtained an order restraining the plaintiff from further prosecuting the suit in Tennessee. In disregard of the order of injunction she prosecuted the suit in Tennessee to a final decree. Thereupon the Arkansas court denied her the right to defend further against the cross-complaint and rendered judgment against her. The defendant introduced all the evi-

dence available to plaintiff and the record contained all the pleadings, papers and motions that she had been denied the privilege of filing. The court held that it was fully in possession of all the facts, that upon them this court could see what judgment was right; and that plaintiff had not been prejudiced by the court's action. From this Judge Eakin delivered a lengthy dissent, in which he reviews the authorities and concludes that while a party might be denied the right to maintain a suit as a punishment for contempt, he could not be denied the right to defend a suit brought against him.

Id., 226, 233.

In *Foley* v. *Foley,* 52 Pac. (Cal., A. D. 1898), 122, which was an action for divorce, the lower court struck the demurrer of defendant from the files, (1) because he had failed to pay alimony as directed, and (2) because he had refused to subscribe to his deposition. Judgment was then rendered against him by default. On appeal it was argued that the court's action in striking his demurrer and rendering judgment by default was not due process of law. The earlier decisions of the Supreme Court of California warranted the action taken, but the court, upon the authority of *Hovey* v. *Elliott,* held the judgment erroneous. It was contended that the code of civil procedure of the state expressly authorized the action taken because defendant had refused to subscribe his deposition. But the court said that if such was the effect of the code it was to that extent obnoxious to the doctrine of *Hovey* v. *Elliott,* and therefore void. That if an act was an

invasion of constitutional right it did not matter whether it arose from attempted legislative sanction or a naked unauthorized act of the court. That in either case the attempt was equally ineffective. That it was a question of a Federal nature, upon which recourse could always be had to the Supreme Court of the United States; and that its decision in *Hovey* v. *Elliott* had settled in this country, and for all courts, a question about which there had existed much diversity of opinion.

The decision in the case above was quoted, approved and followed by the Supreme Court of California in *Younger* v. *Superior Court,* 69 Pac., 485, where the lower court had stricken a complaint from the files for alleged contempt in making the presiding judge a party defendant to the suit.

In *McClatchey* v. *Superior Court,* 51 Pac. (Cal., 1897), 696, a party was punished for contempt of court in falsely publishing a report in relation to a cause on trial. The judge refused to permit the party accused to make a defense, and adjudged him to pay a fine of $500. Certiorari was brought to quash the judgment, and the Supreme Court held that, as it was rendered without giving the accused a right to be heard, it was not due process of law, and that it was a nullity under the doctrine in *Galpin* v. *Page,* 18 Wall., 350, and *Hovey* v. *Elliott,* 167 U. S., 409.

In *Greig* v. *Ware,* 55 Pac. (Colo., 1898), 163, an action of replevin was brought and a bond was executed by the plaintiff and the property was seized and delivered to him. Subsequently, on motion of defendants, and upon a showing that the bond was insuffi-

cient, the plaintiff was ruled to give a new bond. He failed to do it and the court struck his complaint from the files and rendered judgment against him. Upon appeal this action of the court was originally sustained. But upon a motion for a rehearing it was reversed by the Supreme Court upon the authority of *Hovey* v. *Elliot*. The court said:

> "We conclude that while a court has inherent power to enforce obedience to its orders, under pain of a proper penalty, it has not the authority to punish a party for disobedience to such orders in a manner which results in depriving him of a trial of the cause in which such orders are made, upon its merits."
>
> Id., p. 165.

In *State* v. *Clancey*, 61 Pac. (Mont., 1900), 987, a party had been cited to answer a rule for contempt of court, alleged to have been committed by disobeying an injunction issued in a cause in which he was a defendant. The court below refused to hear him upon a motion made by him to dissolve the injunction and upon a motion by plaintiff for an injunction *pendente lite*, on the ground that he had violated the temporary injunction, and was in contempt of the court. The Supreme Court held that he was entitled to make his defense, under the doctrine of *Windsor* v. *McVeigh*, and of *Hovey* v. *Elliott*, saying:

> "Wherever one is assailed in his person or his property, there he may defend; for the liability and the right are inseparable. This is a principle of natural justice recognized as such by the common intelligence of all nations. A sentence of a court, pronounced against a party without hearing him or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal."

The case of *State* v. *Clancey*, 61 Pac., 987, was considered, approved and followed in *Harley* v. *Montana, etc.*, 71 Pac. (Mont.), 407, where the court say:

> "To say that courts have inherent power to deny all right to defend an action and to render a decree without any hearing whatever, is, in the very nature of things, to convert the court exercising such authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends."

In *Hebb* v. *County Court*, 37 S. E. (W. Va.), 678, the court held that so long as there was any defense that a party could make, the court could not refuse such defense on the theory that the party was in contempt. The party, being a defendant, though in contempt, could not be denied the right to make his defense, as might have been done if he had been the plaintiff.

The Court of Appeals of Virginia, which is the court of last resort in that state, had before it some of these "confiscation" cases, involving rulings of the Federal District Judge in that state during, and immediately after, the war, that no "rebel" or "traitor" could appear in his court and defend, when served with constructive process to do so. Two of the cases are, *Underwood* v. *McVeigh*, 23 Grattan, 409, and *Fairfax* v. *Alexandria*, 28 Grattan, 16. It is pleasing to note that there is no discord between the Virginia court and the Supreme Court of the United States in treating the subject. In the first case it was said:

> "The sentence of condemnation and sale was a nullity and void *in toto*. It was rendered absolutely void by the act of the court in refusing to permit McVeigh to appear and be heard. The authorities on this point are overwhelming, and

the decisions of all the tribunals of every country, where an enlightened jurisprudence prevails, are all one way. It lies at the very foundation of justice that every person who is to be affected by an adjudication should have an opportunity of being heard in defense, both in repelling the allegations of fact and upon the matters of law; and no sentence of any court is entitled to any respect in any other court, or elsewhere, when it has been announced *ex parte* and without opportunity of defense. A tribunal which decides without hearing the defendant, or giving him an opportunity to be heard, cannot claim for its decree the weight of a judicial sentence."

Citing—

Smith's Leading Cases, Vol. 1, Part 2, 1118.

In *State* v. *City of New Orleans,* 42 La. Ann., 92, it is held:

"A municipal corporation, sued under an enactment deemed by it to be unconstitutional, the object of which is to compel it to increase an appropriation from its alimony, has the right to plead the unconstitutionality of the act and to have the contention determined by the courts. It cannot be called on to show cause why a relief sought against it should not be granted, and, when it appears in response, be met with the objection that it has no standing in court and cannot be heard. In such cases the courts will not refuse to listen to the defense; but will inquire and pass upon the merits."

In *The Fred M. Lawrence,* 94 Fed., 1017, the Court of Appeals of the Second Circuit, interpreting the judgment in *Hovey* v. *Elliott,* said:

"It is true that a court cannot deprive a defendant of the opportunity to appear, or, after a reasonable appearance, to defend, either as a punishment or because he may be deemed to have forfeited such rights by any misconduct."

In *Altschule* v. *Doyle,* 55 Cal., 633, 640, where ejectment was brought against a landlord and his tenant, and the answer of the landlord was stricken from the files, it was held that a judgment in favor of plaintiff was a nullity against the landlord.

In *Fayerweather* v. *Richt,* 88 Fed., 713, 718, an action was tried between the beneficiaries under a will and the executors. The next of kin, who claimed an interest, were made defendants. The special term decided the cause without passing on the issues tendered by the next of kin. The general term, on appeal, decided the cause without passing on these issues. Judge Wheeler said that the judgment, so far as it affected the next of kin, was not due process of law, and was not conclusive upon their rights in a collateral proceeding, since it was rendered without hearing them.

In *Warner* v. *Godfrey,* 186 U. S., 365, 377, it was held that where the Court of Appeals decided the issues in favor of the defendants, it could not remand the cause with leave to the plaintiffs to amend their bill without reopening the case and giving the defendants an opportunity to defend the bill as amended.

In *Baltimore, etc., Ry.* v. *Read,* 62 N. E., 488, the court held that a statute of Indiana making railroads liable to their servants for injuries caused by the negligence of fellow-servants, could have no extra territorial effect; and that where a servant who resided in Indiana was injured in Illinois, and sued in Indiana to recover damages for his injury, the statute of the latter state, which provided that railroads could not rely upon the decisions or statutes of other states to relieve them of liability could not be enforced, since it

was an effort to cut off the right to make a defense and was not due process of law as defined in *Hovey* v. *Elliott.*

In *Chapman* v. *Phoenix Bank,* 85 N. Y., 437, 451, the court held, upon the authority of *Windsor* v. *McVeigh,* that the confiscation of bank stock in a proceeding which did not secure a hearing to the owner, was a nullity. To the same effect is *Grinson* v. *Edwards,* 21 W. Va., 347, 362, which held that a notice without a right to defend is equivalent to no notice.

In *Darrs' Admr.* v. *Rohr,* 82 Va., 359, 362, notice without opportunity of being heard in defense is held invalid. To the same effect is *Schlitz* v. *Roenits,* 86 Wis., 36, 40.

It will be seen from the citations above, and many similar citations might be made, that the courts have held judicial proceedings, bad, not only where the opportunity to be heard was denied by striking pleadings and proceeding to judgment as upon failure to plead; but equally where, in any other way, the proceeding was so conducted as in effect to cut off or destroy the right. See cited above, 55 Cal., 633, 640; 88 Fed., 713, 718; 186 U. S., 365, 377; 62 N. E., 488; 122 Mo., 161, 174; 45 S. C., 464, 466. It matters not what the method may be that effects the result, if in any way the procedure is such as to deny the opportunity to defend, it is not due process of law, and the court is without jurisdiction to condemn either the property or person.

Counsel for the defendant in error will no doubt rely upon the case of *Ill. Cent. Ry.* v. *Sanford,* 23 So. (Miss.), 355. But it is distinguishable from this case in many essentials.

That was a suit for damages. The defendant filed a plea of denial. The plaintiff then filed fourteen interrogatories addressed to the defendant, under a statute which provided "that if the testimony of a party to a suit who resides out of the state be desired by the adverse party, interrogatories might be filed, and if the party interrogated failed to answer the interrogatories, his suit should be dismissed if he be plaintiff; and if he be defendant, his plea might be taken off the file and a judgment by default entered." The defendant failed to answer the interrogatories, its plea was stricken from the files and a default was entered against it. The court held that the right of a party to be heard had never been thought to deprive the legislature of the power of changing the rules of evidence, or of modifying or abrogating the presumption indulged by the principles of the common law. That if the legislature could provide for a discovery of evidence in the hands of the adversary party, it could impose upon such party the conditions of a failure to make such discovery. And that when the legislature requires a discovery to be made, and imposes the conditions of a refusal, such conditions become the law of the land, and to pursue the statute is due process of law. To sustain this conclusion nothing is cited but Baggs case, cited in *Hovey* v. *Elliott,* 167 U. S., 416.

That case may be distinguished from this upon the grounds (1) that it was an action of a strictly civil nature, in which discovery could have been asked according to the principles of equity jurisprudence, whereas, this is an action of a penal or criminal nature, in which discovery was not enforcible in equity; (2) the

statute there provided for interrogatories to be addressed to the adversary party, and compliance was within its power; whereas the statute relied upon in this case requires the adversary party to coerce the attendance, before a commissioner at any place designated, of its officers, agents and employees, and the production by them of all books, papers and documents, the requirement of the statute of Mississippi being within the power of the party whereas the requirements of this statute are not within its power; (3) the Mississippi statute provides for answering interrogatories merely, while the Arkansas statute provides for the unlimited production of books, papers and documents; that statute imposes no cost on the party interrogated, while this imposes some expense and damage in loss of the use of books, papers and documents, and the further loss of exposing private affairs to unlimited and unrestricted scrutiny; (4) that statute calls for evidence in support of the cause of the party interrogating, while this statute requires the production of all books, papers and documents relating to the defense of the party interrogated; (5) that statute extends its benefits alike to both parties, while this statute confines its benefits to the plaintiff; and (6) the making of the order is only authorized by that statute, which permits the exercise of a sound, legal discretion by the court, while this statute makes it the duty of the court to make the order upon the application of plaintiff's attorney, and leave nothing to the legal discretion of the court. That proceeding has some resemblance, though remote, to the proceeding by discovery in equity, while ours has no resemblance to any

proceeding ever known to our courts, and is without sanction or precedent in legal practices.

But the opinion in the Sanford case is short, little reasoned and contains no review of the authorities. It is placed upon the authority of Baggs case only, and it is plain from a reading of *Hovey* v. *Elliott*, 167 U. S., 416, that this Court gave Baggs case a very different interpretation, as did also the Court of Queen's Bench, when considering it in *Bonaker* v. *Evans*, 16 Q. B., 162.

It will be observed that the Supreme Court of Mississippi placed its decision upon one of two grounds, either that the failure to answer the interrogatories was made conclusive proof of the existence of the facts necessary to defeat the cause of the party failing, or that such failure should warrant the striking of its pleadings and the rendition of a judgment against him, as a penalty for disobeying the order of the court. As the unanswered interrogatory might have reference to a single fact, of secondary importance, it is improbable that the legislature considered a failure to answer it sufficient evidence to disprove his cause; but if such was the view it took, it was not within its power to so enact. This will appear by the authorities cited hereafter, holding that it is not within the power of the legislature to enact conclusive presumptions of fact. If it was intended as a penalty inflicted for contempt of the authority of the court (and this is the ground for such orders, as stated by the Supreme Court of Georgia in *Georgia* v. *Etowah*, 30 S. E., 879), it is directly in conflict with *Hovey* v. *Elliott*, 167 U. S., 417, where the court holds that the legislative department of the

government could not sanction such action. See also *Foley* v. *Foley,* 52 Pac. (Cal.), 122.

If the statute, in its operation, would result in the rendition of judgments without due process of law, the fact that it authorized the proceeding, would not make it due process of law, and we submit that the broad statement of the Mississippi court is in direct conflict with the decision in *Hovey* v. *Elliott,* 167 U. S., 417, and with other authorities.

Foley v. *Foley,* 52 Pac., 122.
State v. *Billings,* 55 Minn., 473.
Cooley's Con. Lim., pp. 452, 453.
Zeigler v. *R. R.,* 58 Ala., 594.
Darman v. *State,* 34 Ala., 216.
Calhoun v. *Fletcher,* 63 Ala., 574.
Clark v. *Mitchell,* 64 Mo., 578.
Griffin v. *Mixon,* 38 Miss., 424.
Board v. *Bakewell,* 122 Ill., 348.
Westervelt v. *Gregg,* 12 N. Y., 211, 212.

In matters of contract the existence of a statute may be important or even controlling upon the question of due process of law; but outside of contracts, a statute cannot, by providing an arbitrary course of proceeding, in violation of the established principles and usages of free government, make it due process of law by saying that it should be so considered. In *Orient Ins. Co.* v. *Daggs,* 172 U. S., 566, the court say:

> "It is one thing to attribute effect to the convention of parties entered into under the administration of the law, and another thing to give to circumstances, maybe accidental, conclusive presumption and proof to establish and force a result against property or liberty."

Judge Cooley says:

> "But it (the legislature) has no power to establish rules which under pretense of regulating the presentation of evidence go so far as altogether to preclude a party from exhibiting his rights."

Cooley's Con. Lim., pp. 452, 453.

State v. *Billings,* 55 Minn., 473.

Foley v. *Foley,* 52 Pac., 122.

Zeigler v. *R. R.,* 58 Ala., 594.

Cairo, etc., Ry. v. *Parks,* 32 Ark., 131.

In the cases cited the conclusion was reached upon the ground that the legislature could not deprive a person of his property by the enactment of rules of evidence prescribing presumptions against which he could not prove the facts in support of his rights. This limitation upon legislative power has not been recognized in all the states, as is stated in the opinion of this court in *Ry.* v. *Parks,* 32 Ark., 146 *et seq.,* but it has been too often affirmed and in a variety of cases too extensive to leave any necessity for arguments as to its existence in Arkansas or as to the universality of its application.

The difference between the authority of the legislature to enact laws regulating matters of contract and its authority to enact arbitrary rules with respect to other matters, is too plain to require argument. In the former class of cases the law enters into and becomes a part of the contract, and persons making agreements know that and act accordingly. But no one by living in a state, or doing business there, consents that proof that he is on the streets shall be conclusive evidence that he committed murder; or that proof that

he was accused of murder and stood mute should be tantamount to a plea of guilty in open court. And corporations, no more than individuals, surrender their rights to challenge such enactments, merely by doing business in the state.

Cargill v. *Minn.*, 180 U. S., 468.
Carroll v. *Greenwich Ins. Co.*, 199 U. S., 409.

It may be argued, with respect to the harsh and mandatory provisions of the statute, that the Circuit Court will not enforce it unreasonably. But it leaves no discretion to the Circuit Court. It is an example of a legislative exercise of judicial power. The mandate to the court is that, if the person or persons whose testimony is requested shall fail to appear and testify, "then it shall be the duty of the court, upon motion of the attorney general," etc., "to strike out the answer," etc., "and said court shall proceed to render judgment by default against said corporation," etc. Even if the act be construed to repose or permit a discretion in the court, then it is no less objectionable. The Supreme Court of the United States, in *Roller* v. *Holly*, 176 U. S., 398, said, in considering a default entered upon unreasonable terms under a Texas statute:

> "Very probably the court which rendered the judgment would have set the same aside and permitted him to come in and defend. But that would be a matter of discretion—a contingency which he is not bound to contemplate. The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion."

To the same effect is the decision in *State* v. *Billings*, 55 Minn., 473. The statute must provide for due pro-

cess of law, and persons affected by the statute must be accorded it as a matter of right, and not be forced to beg for it as a matter of favor, or to hope for it as a matter of chance.

Stuart v. *Palmer*, 74 N. Y., 188.

The decision of the State Supreme Court, we respectfully submit, does not at all meet this question. Judge Hill, seeking to distinguish *Hovey* v. *Elliott*, *supra*, says:

> "The decision was expressly rested 'on the want of power in the courts of the District of Columbia to suppress the answer of parties defendant, and after so doing to render a decree *pro confesso*, as in case of default for want of an answer.' In the case at bar the court did not lack power to strike out the answer and proceed as in case of default if it was competent for the state to confer that power upon the court. Hence the question here is not the power or want of power in the court, but the power or want of power in the state to enact the statute under review. *If the court in Hovey* v. *Elliott had held as did this court in Pickett* v. *Ferguson, that the power to strike out the answer and proceed as in case of default, was an inherent power of the court, and still a judgment rendered under it was taking property without due process of law, then Hovey* v. *Elliott would be conclusive of this issue.* But the decision was predicated upon the premise that the power exercised was contrary to the law of the land, and the sequence followed that property was taken without due process."

The reasoning of the court is somewhat ambiguous, but it apparently misconceived the ground upon which the opinion rested. The question of the limitation of power of the courts of the District of Columbia was specifically waived by this court. Justice White,

for the court, assumed that the courts of the District of Columbian had general powers to punish for contempt, and proceeded to consider what he termed "a more fundamental question," which he stated in the following language:

> "Whether courts having plenary power to punish for contempt have the right to summon a defendant to answer and then, after obtaining jurisdiction by the summons, refuse to allow the party summoned to answer, or strike his answer from the files, suppress the testimony in his favor and condemn him without consideration thereof and without a hearing, on the theory that he has been guilty of a contempt of court."

As we read the extract from the opinion of Chief Justice Hill, *supra*, had it not been for a misconception of the ground upon which the opinion in *Hovey* v. *Elliott* rested, that opinion would have been regarded as conclusive by the Arkansas Court, and as such we respectfully submit it. Mr. Justice White therein says:

> *"If the legislative department of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an enactment would not be violative of the Constitution? If this be true, as it undoubtedly is, how can it be said that the judicial department, the source and fountain of justice itself, has yet the authority to render lawful that which if done under express legislative sanction, would be violative of the Constitution."*

Conclusion.

Our comments on the sections of the statute involved in the case are made in the abiding conviction that the criticisms are just, and that there is no statute to be found upon the pages of legislation that manifests a more complete disregard of the rights of litigants or of the fundamental principles of justice as justice obtains in a constitutional government, or a more wanton and arbitrary assertion of power without regard to constitutional restraints. We have no doubt that a statute which embodies in a just, sane and rational manner provisions to accomplish the purposes declared in the title of the Act, should and will be enacted; but we submit that this policy should be entered upon with a statute that regards the fundamental rights of all persons concerned; that rests upon the principles of right and justice; and that proceeds in a sane and rational manner, consistent with the preservation of those rights and the maintenance of those principles to accomplish the object in vew; to accomplish it in behalf of the welfare of the people of the state and not for the harrassment or oppression of those within the scope of its restraining power. But we do submit that the courts should never yield their countenance to a statute which sacrifices the fundamental rights of all people in a free government, in a wild, irrational and ineffective attempt to protect trade from imagined restraints. The rights of personal liberty and to immunity against condemnation without hearing, to demand due process of law and the equal protection of

the law—rights that are essential to all free men—should not be sacrificed in an effort to preserve the freedom of trade from any kind of restraints. The freedom of trade from pernicious combinations can be secured without sacrificing the freedom of the people by arbitrary and oppressive legislation.

Conspiracies to defraud the public by unlawful restraint of trade can never become very oppressive or greatly prejudice the people, without furnishing some evidence of their existence; and when they become serious enough to demand prosecution at the hands of public officials they must necessarily have furnished the means of their detection and the proof to warrant their conviction. Until this is done there can be no more reason in the merits of the case than justification in law for issuing general orders on the defendant to submit to unlimited search and seizure of its books, papers and documents, or to furnish the evidence for its own conviction from the mouths of its employes, officers and directors, to whom, in exchange for such testimony, the corporation can point to no statute which will protect them against punishment for the acts concerning which they are compelled to testify. But whatever may be the exigencies of the case, no occasion can arise that will warrant the courts in sustaining arbitrary enactments of a legislature that require any person to submit to such searches and seizures; or that, either directly or indirectly require any person to give testimony to criminate himself; or that require the courts

of the country to sit in judgment upon persons after they have been denied the right to make a defense.

We respectfully submit that the judgment of the Supreme Court of Arkansas should be reversed.

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Of Counsel.

IN THE

Supreme Court of the United States

HAMMOND PACKING CO., PLAINTIFF IN ERROR,

vs. No. 271.

STATE OF ARKANSAS, EX REL., DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR

Counsel for appellant having elected to stand upon Rule 21 of this court, which allows them to file their brief six days before the case is called for argument, we have not been favored with a copy of same in preparing ours. It is therefore impossible for us to answer their arguments, except from our general knowledge of the issues in the case and the course of the argument in the court below.

Assuming that a sufficient statement of the case will be made by counsel for appellant, we make here only such a general statement as would seem to aid in placing our positions before the court.

STATEMENT OF CASE.

This is an action brought by the State of Arkansas, at the relation of her Attorney General, under the Act of the General Assembly of that State, approved January 23, 1905 (hereinafter for convenience called the Act of 1905), against the Hammond Packing Company, the plaintiff in error here.

The material portions of the Act of 1905 are as follows:

"AN ACT, providing for the punishment of pools, trusts and conspiracies to control prices, and as to evidence and prosecution in such cases.

"SECTION 1. Any corporation organized under the laws of this or any other State, or country, and transacting or conducting any kind of business in this State, or any partnership or individual, or other association or persons whatsoever, who are now, or shall hereafter create, enter into, become a member of, or a party to, any pool, trust, agreement, combination, confederation or understanding, whether the same is made in this State or elsewhere, with any other corporation, partnership, individual, or any other person or association of persons, to regulate or fix either in this State or elsewhere the price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning or tornado, or to maintain said price when so regulated or fixed, or who are now, or shall hereafter enter into, become a member of, or a party to any pool, agreement, contract, combination, association or confederation,

whether made in this State or elsewhere, to fix or limit, in this State or elsewhere, the amount or quantity of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning, storm, cyclone, tornado, or any other kind of policy issued by any corporation, partnership, individual or association of persons aforesaid, shall be deemed and adjudged guilty of a conspiracy to defraud and be subject to the penalties as provided by this Act.

"SEC. 2. Any person, partnership, firm or association, or any representative or agent thereof, or any corporation or company, or any officer, representative or agent thereof, violating any of the provisions of this Act, shall forfeit not less than two hundred dollars nor more than five thousand dollars for every such offense, and each day such person, corporation, partnership or association shall continue to do so shall be a separate offense, the penalty in such case to be recovered by an action in the name of the State at the relation of the Attorney General or Prosecuting Attorney; the moneys thus collected to go into the State treasury for the benefit of the common school fund of this State, except as hereinafter provided. * * *

"SEC. 8. Whenever any proceeding shall be commenced in any court of competent jurisdiction in this State by the Attorney General or Prosecuting Attorney against any corporation or corporations, individual or individuals, or association of individuals, or joint stock association or copartnership under the law against the formation and maintenance of pools, trusts of any kind, monopolies or confederations, combinations or organizations in restraint of trade, to dissolve the same or to restrain their formation or maintenance in this State, or recover the penalties in this Act provided, then and

in such case, if the Attorney General or Prosecuting Attorney desires to take the testimony of any officer, director, agent, or employe of any corporation, or joint stock association proceeded against, or in case of a copartnership, any of the members of said partnership, or any employe thereof, in any court in which said action may be pending; and the individual or individuals whose testimony is desired are without the jurisdiction of this State, or reside without the State of Arkansas, then in such case the Attorney General or Prosecuting Attorney may file in said court in term time, or with the judge thereof in vacation, a statement, in writing, setting forth the name or names of the persons or individuals whose testimony he desires to take, and the time when and the place where he desires said persons to appear; and thereupon the court or judge thereof shall make an order for the taking of said testimony of such person or persons, and for the production of any books, papers and documents in his possession or under his control relating to the merits of any suit, or to any defense therein, and shall appoint a commission for that purpose, who shall be an officer authorized by law to take depositions in this State, and said commission shall issue immediately a notice, in writing, directed to the attorney or attorneys of record in said cause, or agent, or officer, or other employe, that the testimony of the person named in the application of the Attorney General or the Prosecuting Attorney is desired, and requesting said attorney or attorneys of record, or said officer, agent or employe, to whom said notice is delivered, and upon whom the same is served, to have said officer, agent, employe, representative of said copartnership, or agent thereof, whose evidence it is desired to take, together with such books, papers and documents, at the place named in the application of the Attorney General, or the Prosecuting Attorney, and at the time fixed in said application, then and there to testify; *provided, however,* That such ap-

plication shall always allow in fixing said time the same number of days travel to reach the designated place in Arkansas that would now be allowed by law in case of taking depositions; *provided also,* In addition to the above named time, six days shall be allowed for the attorney or attorneys of record, or the agent, officer or employe on whom notice is served, to notify the person or persons whose testimony is to be taken. Service of said notice as returned in writing may be made by any one authorized by law to serve a subpoena.

"SEC. 9. Whenever the persons mentioned in the preceding sections shall be notified, as above provided, to request any officer, agent, director or employe to attend before any court or before any person authorized to take the testimony in said proceedings, and the person or persons whose testimony is requested, as above provided, shall fail to appear and testify and produce any books, papers and documents, they may be ordered to produce by the court, or the other officer authorized to take such evidence, then it will be the duty of the court, upon motion of the Attorney General or Prosecuting Attorney, to strike out the answer, motion, reply, demurrer or other pleading then or thereafter filed in said action or proceeding by the said corporation, joint stock association or copartnership, whose officer, agent, director or employe has neglected or failed to attend and testify and produce all books, papers and documents he or they shall have been ordered to produce in said action by the court or person authorized to take said testimony, and said court shall proceed to render judgment by default against said corporation, joint stock association or copartnership. *And it is further provided,* That in case any officer, agent, employe, director or representative of any corporation, joint stock association or copartnership in such proceeding, as hereinbefore mentioned, who shall reside or be found within this State, shall be subpoenaed to appear and testify or

to produce books, papers and documents, and shall fail, neglect or refuse to do so, then the answer, motion, demurrer or other pleading then and thereafter filed by said corporation, joint stock association or copartnership in any such proceeding, shall, on motion of the Attorney General or Prosecuting Attorney, be stricken out and judgment in said cause rendered against said corporation, joint stock association or copartnership."

The Act was approved January 23, 1905, and went into effect sixty days thereafter.

This was a civil action commenced by complaint (Record 1-4) filed by the State at the relation of her Attorney General, and alleging in substance:

That the defendant (plaintiff in error here) is a foreign corporation.

That on five certain days in March, 1905, subsequent to the taking effect of said Act of 1905, it was transacting and conducting business in Arkansas.

That on said days the defendant was a member of and a party to a combination (describing same in the language of Section One of the Act of 1905) to fix and control the price of certain manufactured commodities, in violation of Section One of said Act of 1905.

That, *by transacting and conducting business in Arkansas while a member of said combination,* and by

being a member of said combination while transacting and conducting business in Arkansas, it violated the provisions of said Act and became liable to the penalties thereof.

The prayer was for judgment for the money penalty prescribed by the Act and for forfeiture of the defendant's right to do business in Arkansas.

There were two other causes of action set up in the complaint and subsequent amendment; but, by stipulation of parties (Record, 28), judgment was taken upon the first cause alone. Hence these others need not be considered here.

The defendant filed a motion to make more specific, upon the overruling of which it filed a demurrer and answer.

Subsequently the Attorney General, in pursuance to Section Eight of the Act of 1905, filed a motion or request in writing for an order of examination of certain persons, alleged to be non-resident officers, agents, directors and employes of the defendant and under its control; and for an order requiring the production of books, papers and documents relevant to the case. (Record, 9-11.)

The defendant filed a motion to make this request more specific (Record, 11-13), and a motion to require

the deposition to be taken on interrogatories (Record, 8); both of which were denied.

No issue was ever taken by defendant upon the allegations of the request, that the persons named therein were officers, agents, directors and employes of defendant and under its control, or that it had in its possession and under its control, or that of the persons named in the application, the books, papers and documents as alleged.

The court, on a hearing, granted the motion of the Attorney General, made an order directing the production for examination of the persons and the books, papers and documents named in the request of the Attorney General; and further ordered that a commission in accordance therewith issue to Lyle D. Taylor. (Record, 13.) Accordingly a commission was issued to Lyle D. Taylor (Record, 43-4), to which was attached a copy of the order of court.

On receipt of this, the commissioner caused notice to be issued upon the president and the attorneys of record of the defendant, to produce the persons (naming them) and books, papers and documents, before him at a time and place named. (Record, 48-9.)

On the day fixed for the commencement of the taking of evidence before the commissioner, the parties

appeared by counsel, and the taking of evidence was continued by consent from day to day, for several days. (Record, 47.) Finally, on October 2, 1906, one of the adjourned dates, the commissioner, at the request of the Attorney General, called for the production for examination of J. Ogden Armour, one of the persons named in the commission and notice. (Record, 47-8.)

In response thereto, the defendant handed to the commissioner a letter declining to produce *any of its officers or employes as witnesses or any books, papers or documents.* (Record, 50-51.)

On return of the commission to the circuit court of Pulaski county, showing these facts, the Attorney General filed therein a motion (Record, 29-30), under Section Nine of the Act of 1905, setting forth the proceedings before the commissioner and the refusal of the defendant to comply with the order of examination, and praying that its pleadings be stricken out and judgment, as by default, be entered against defendant on the first cause of action in the complaint pursuant to stipulation of parties. (Record, 28.)

The defendant filed a response (Record, 32-4) to said motion, setting up:

(1) That the order of examination was not in conformity to the statute.

(2) That the statute was invalid because it did not require a showing to be made that the persons named in the application had knowledge of material facts.

(3) That no showing was made, as contemplated by the statute, that the books, papers and documents contained material evidence; and that the order as made was unreasonable.

(4) That the order was improvidently made.

(5) That the court erred in not requiring the depositions to be taken on written interrogatories.

(6) That the statute of 1905 is unconstitutional, because:

1st. It is an *ex post facto* law.

2d. It seeks to punish acts done outside the State.

3d. It denies the defendant the equal protection of the law. And,

4th. It is in violation of the contract between the State and the defendant.

(7) That Section Eight of the Act of 1905 is unconstitutional, because:

1st. It denies the defendant the right to be confronted with the witnesses against it.

2d. It subjects defendant to an unreasonable search and seizure.

(8) That the order to produce books, papers and documents was unreasonable and unjust, and denied defendant the equal protection of the laws.

(9) That the defendant could not be required to obey said order of production, and that the court could not deny it the right to be heard for disobedience thereof.

(10) That to strike out the defendant's pleadings and render judgment against it as by default would be to deny it the equal protection of the laws and to take its property without due process of law.

[*It will be observed that the defendant nowhere denies that the persons named in the order of production are its officers, agents, directors or employes; that they are under its control; that they have in their possession books, papers and documents relevant to the issues in the case, or that it can not produce said persons and documentary evidence.*]

A hearing was had on the motion and response (Record, 35-36), and judgment rendered as prayed in the motion of the Attorney General. (Record, 36.)

On appeal, the Supreme Court of Arkansas affirmed this judgment. (Record, 53-61.)

We think this statement fairly presents the issues in this case.

The appellant has made twenty-one assignments of error. (See record, 65-71.) These assignments are divisible into five general classes:

1st. Those attacking the validity of Sections One and Two of the Act of 1905. To this class belongs the 1st, 2d, 7th, 8th, 20th and 21st assignments.

2d. Those attacking the validity of Section Eight of the Act of 1905. To this class belong Nos. 3, 4, 9 and 10.

3rd. Those attacking the validity of Section Nine of the Act of 1905. To this class belong Nos. 5, 6, 11, 12, 15, 16, 17 and 18.

4th. Those attacking the validity of Sections Eight and Nine. These are Nos. 13 and 14.

5th. Those attacking the validity of Sections One, Two, Eight and Nine combined. No. 19 is of this class.

We shall answer these assignments of error as above classified. But, at the threshold of this case there lies a proposition which applies to every constitutional question urged by appellant—that of the contractual status of the appellant and the State of

Arkansas. The appellant is a foreign corporation, doing business in Arkansas and possessing only contract, and not inherent, rights in that behalf. We maintain that:

I.

THE ACT OF 1905 IS ONE PASSED IN THE EXERCISE OF THE RESERVED POWER OF THE STATE TO ALTER, AMEND OR REPEAL THE LAWS AFFECTING CORPORATIONS. THE APPELLANT BY ENTERING THE STATE ASSENTED TO THIS RESERVATION, AND BY REMAINING IN THE STATE AFTER THE ACT TOOK EFFECT ASSENTED TO BE BOUND BY THE TERMS THEREOF.

This is a proposition which runs through most, if not all, the contentions presented by appellant. Hence, in order to avoid repetition thereof, we present our argument upon it under one heading, and refer to same whenever the principles here discussed are applicable to the contentions presented by the appellant.

Ever since the decision in the *Dartmouth College Case*, it has been the rule that State Constitutions have been so moulded that their grants of power to corporations should not be irrevocable. This has been

accomplished by constitutional provisions reserving to the State the power to alter, amend, annul or revoke the charters of corporations, or, in States where corporations are formed under general laws, to alter, amend or repeal such laws from time to time.

Foreign corporations, of course, come into any State only by grace. They have no inherent or constitutional rights so to do. Any State may refuse to admit them; or, if it admits them, may annex thereto any condition—reasonable or unreasonable—which it may deem proper.

The Constitution of Arkansas contains the following provisions applicable to the entry of foreign corporations, viz:

"Foreign corporations may be authorized to do business in this State under such limitations and restrictions as may be prescribed by law; provided that * * * as to contracts made or business done in this State, they shall be subject to the same regulations, limitations and liabilities as like corporations of this State, and shall exercise no other or greater powers, privileges or franchises than may be exercised by like corporations in this State."

Constitution of Arkansas, Art. 12, *Sec.* 11.

This court, in the recent case of *American Smelting & Refining Company vs. Colorado,* 204 *U. S.*, 103, held that under a similar provision of the Constitution

of Colorado, a foreign corporation, upon entering the State and complying with existing laws, became entitled to continue in the State subject only to the right of the State from time to time to impose *the same* and no greater regulations and restrictions as were applied to like domestic corporations—i. e., that the power of the State to alter, amend or repeal charters of domestic corporations is the measure of its power in respect to foreign corporations.

And, in a recent case, in the United States Circuit Court for the Eastern District of Arkansas, Trieber, D. J., following the decision of this court in the Colorado case, gave this construction to Art. 12, Sec. 11, of the Constitution of Arkansas, above quoted.

C. R. I. & P. Ry. vs. Ludwig, 156 *F.*, 152.

The reservation to the State of power to amend, alter or repeal the charters of domestic corporations is contained in the following constitutional provision:

"Corporations may be formed under general laws, which laws may, from time to time, be altered or repealed. The General Assembly shall have power to alter, revoke or annul any charter of incorporation now existing and revokable at the adoption of this Constitution, or that may be hereafter created, whenever, in their opinion, it may be injurious to the citizens of this State, in such manner, however, that no injustice shall be done to corporators."

Constitution of Arkansas, Art. 12, *Sec.* 6.

In the case of *American Smelting Co. vs. Colorado*, 204 *U. S.*, 103, *supra*, the question was as to the validity of a statute of Colorado which attempted to compel foreign corporations already doing business in the State to pay certain taxes not made obligatory on like terms upon domestic corporations. The Constitution of Colorado contained a provision similar to Art. 12, Sec. 2, of the Constitution of Arkansas, above set out. It was held that when the company came into the State, under the terms of the constitutional guaranty, the State became bound to it by a contract that no discrimination would be made between it and like domestic corporations; and that the Act was therefore void as one impairing the obligation of a contract.

It will be observed that the ground of jurisdiction of the Supreme Court of the United States or the Federal question involved in that case was that the statute of Colorado was an impairment of the obligation of an existing contract in violation of Art. 1, Sec. 10, of the Constitution.

And so, in the case of *C. R. I. & P. Ry. vs. Ludwig*, *supra*, the Act under consideration discriminated between foreign and domestic corporations, and was held, *pro tanto*, void as impairing the contract between the State and the corporation.

But it can not be contended that the anti-trust Act of 1905, under consideration, does in any way discriminate between foreign and domestic corporations. Section One, which prescribes the elements of one of the illegal combinations denounced by the Act, applies to "*any corporation organized under the laws of this or any State or country* and transacting or conducting any kind of business" in Arkansas. And so, throughout the other sections of the Act, the provisions which relate to corporations apply alike to foreign and domestic corporations. And coming more particularly to Sections Eight and Nine, which are attacked here, it will be found that they apply equally to foreign and domestic corporations. Section Eight provides that "when any proceeding shall be commenced in any court of competent jurisdiction in this State * * * against *any corporation* or corporations" the Attorney General may file a statement in writing setting forth that he wishes to examine certain named officers, agents, directors or employes of the defendant; and that the court shall order a commission to issue, etc.

Section Nine provides that on refusal of "*said corporation*" to produce such officers, agents, directors and employes judgment may be rendered against it.

In *American Smelting Co. vs. Colorado, supra,* Mr. Justice Peckham says, at page 113:

"If it were desired to increase the liabilities of the foreign, it could only be done by increasing those of the domestic corporation at the same time and to the same extent."

It will be seen that this requirement is fully met by the Act under consideration; and, upon this phase of the matter, the Federal question in the Colorado case is wholly wanting here.

The right of the State of Arkansas to prescribe conditions upon the right of the defendant and other foreign and domestic corporations to do business in Arkansas, and to lay burdens and duties upon them, flows from the reservation in *Art.* 12, *Sec.* 6, *of the Constitution of Arkansas, supra.* The only limitation upon this right is contained in the provision that such alteration, amendment or revocation of charters shall be made "in such manner, however, that no injustice shall be done to corporators."

What would be a just or unjust amendment or alteration of the laws governing corporate privileges, under this constitutional provision, is and must be a question for the Supreme Court of Arkansas, and in no wise a Federal question reviewable here.

The Supreme Court of Arkansas has held that this Act is valid, under the Constitution of Arkansas.

In *Hartford Ins. Co. vs. State*, 76 *Ark.*, 303, the first case in which the Act of 1905 was construed, the power of the State to exclude corporations which were members of the combinations denounced by Section One of the Act was upheld. Hill, C. J., says, at page 312:

"It is held that the State has declared, and possesses the right to declare, that foreign insurance corporations can not do business in this State while belonging to a pool, trust, combination, conspiracy or confederation to fix or affect insurance rates anywhere."

It is true that the decision in that case was directed particularly to the validity of the first section of the Act of 1905; but the effect of the decision is that, those sections which prohibited a corporation which occupied a certain status from doing business in Arkansas, being otherwise constitutional and valid, constituted conditions which the State had the right to impose under its reserved power to control corporations.

Sections Eight and Nine were not considered in that case; but, by a parity of reasoning, if they are not open to some constitutional objection, peculiar to themselves, they are, in like manner, valid conditions

upon the right of corporations to do business in the State. The various provisions of the Act are all directed to one main purpose; and, if one portion is a condition precedent to the right of a corporation to do business in the State, so are all valid provisions of the Act. A brief synopsis of the Act will show the intimate and inseparable relation between its different sections.

Section One provides that any corporation which, while a member of any illegal combination as therein defined (called, for convenience, a "trust"), does business in Arkansas, shall be deemed guilty of a "conspiracy to defraud," and subject to the penalties of the Act.

Section Two prescribes the money penalty for thus doing business in Arkansas.

Section Three provides that any corporation which violates the Act shall also suffer forfeiture of its right to do business in the State.

Section Five defines monopolies, and provides that corporations which are engaged therein shall be subjected to all the penalties of the Act.

Section Six defines a conspiracy to form or secure a monopoly, and provides that corporations engaged therein shall be subjected to all penalties of the Act.

Section Eight provides for the production of evidence in actions for violation of the Act, and lays upon the corporation the duty to produce same upon proper order of court.

Section Nine provides that, upon failure of the corporation so to do, its answers to it may be stricken out and judgment rendered against it by default in the action.

The other sections are immaterial here.

From this synopsis it will be seen that the Act of 1905 has one main purpose—the exclusion from the State of trusts and monopolies as herein described. To that end it provides that any corporation doing business in the State, while engaged in the acts denounced, shall suffer penalties and forfeit its charter or permit to do business. As subsidiary to this main purpose, and as a means of effectuating it, the Act further provides rules for the production of evidence and means of preventing same from being ignored.

The Act is an entire one, every provision thereof having a dependence upon the others. The duties prescribed by the Eighth and Nine sections thereof are as much conditions and restrictions laid upon corporations by way of amendment to their charters as are those sections which define and denounce the illegal

combinations. It is a necessary conclusion that every provision of the Act was a burden and a condition, placed on corporations doing business in Arkansas, as an exercise of the reserved power of the legislature. The title of the Act itself shows this, for it reads: "An Act providing for the punishment of pools, etc., *and as to evidence and prosecution in such cases.*" It can not therefore be doubted that the provisions as to the production of evidence and the procedure in general were conditions with which the legislature intended to require corporations to comply when called upon.

Compliance with all the requirements of the Act of 1905 is required of foreign corporations, as a condition to the right of doing business in the State. This view receives sanction from the following quotation of Hill, C. J., in the case of *Hartford Insurance Company vs. State,* 76 *Ark.,* 403, *supra.* In that case, in construing this identical Act, it is said, at page 312:

"The Act requires every corporation in this State to annually make affidavit that it does not belong to any trust described in the first section of it, to fix prices in this State or elsewhere; provides for prosecutions against them for failure to make affidavit and for their right to do business to be forfeited. * * * *In the language of the Lancashire case, the State has dictated these terms upon which a foreign corporation may do business in this State.*"

And, in *State vs. Standard Oil Co. of Ind.*, 91 *S. W.*, 1062, the Supreme Court of Missouri in a case involving the provisions of the Missouri anti-trust law, from which the Arkansas Act is mainly derived, construed and upheld the Act as one of regulation of corporations.

And, on the hearing of this cause below, the Supreme Court of Arkansas necessarily, in holding that Sections Eight and Nine of the Act of 1905 were valid, held that their enactment was within the constitutional power of amendment reserved to the State. The highest court of a State is the tribunal of last resort upon all questions of the validity of a State statute as measured by the State Constitution.

Kirtland vs. Hotchkiss, 100 *U. S.*, 491.

Mo. Pac. Ry. vs. Humes, 115 *U. S.*, 512, 520.

Fallbrook Irr. Dist. vs. Bradley, 164 *U. S.*, 112.

French vs. Barber Asphalt Co., 181 *U. S.*, 324.

Hibben vs. Smith, 191 *U. S.*, 310.

Olsen vs. Smith, 195 *U. S.*, 332.

National Cotton Oil Co. vs. Texas, 197 *U. S.*, 130, 131.

Waters-Pierce Oil Co. vs. Texas, 177 *U. S.*, 28, 43.

Hunter vs. Pittsburgh, 207 *U. S.*, 67.

And where the highest court of a State declares that a particular statute is designed as one of regulation upon a corporation, that decision is final and conclusive.

In *Orient Insurance Company vs. Daggs*, 172 *U. S.*, 557, a case where the question was as to the validity of a statute of Missouri, which provided that the defendant in an action upon an insurance policy should not be permitted to deny that the property was worth the amount for which it was insured, this court refused to disturb the decision of the Missouri Supreme Court, holding that the statute constituted a condition upon the right of insurance corporations to do business in that State.

Mr. Justice McKenna says, at pages 566-7:

"That which a State may do with corporations of its own creation, it may do with foreign corporations admitted into the State. * * *

" * * * *It is urged that the statute is not made a condition upon foreign corporations; but this view is not open to our acceptance. The Supreme Court of Missouri, exercising its functions of interpretation, decides that it is.* * * * *Judgment affirmed.*"

The result then is that the dicision of the Supreme Court of Arkansas is conclusive that the statute of 1905 is a statute of regulation upon corporations,

and that the conditions, duties and regulations which it imposes are valid under the Constitution of that State.

Furthermore, the Supreme Court of Arkansas, in the case at bar, has held that Sections Eight and Nine of the Act of 1905 are valid, under the Constitution of Arkansas—i. e., that they constitute such regulations as fall within the reserved power of the State to alter, amend or repeal the laws governing corporations. Upon this proposition, likewise, the decision of the highest court of the State is conclusive.

It is to be observed that the section of the Constitution of Arkansas, which is the measure of the State's power of amendment, repeal or revocation of corporate charters, provides that:

"Corporations may be formed under general laws, which laws may, *from time to time, be altered or repealed.* The General Assembly shall have power to *alter, revoke or annul* any charter of incorporation whenever, in their opinion, it may be injurious to the citizens of this State, in such manner, however, that no injustice shall be done to the corporators."

The proper limitations on this power of alteration, amendment and revocation of corporate rights, when it is reserved in general terms, is well defined in the

In that case, Congress had passed an Act amending the Act incorporating the Union Pacific Railway Company, by requiring that a certain portion of the earnings of the road be devoted to a sinking fund to pay a bonded indebtedness to the United States. The contention was made that the Act deprived the company of its property without due process of law, interfered with vested rights and was unconstitutional. The court held that the Act was valid, as an exercise, by Congress, of the right of amendment, reserved in genral terms in the original Act of incorporation.

Chief Justice Waite, in delivering the opinion of the court in that case, says, at page 720:

"Taking both Acts together * * * we are of the opinion that Congress not only retains but has given special notice of its intention to retain full and complete power to make such amendments of the charter as come within the just scope of the legislative power.

"That this power has a limit, no one can doubt. All agree that it can not be so used as to take away property already acquired under the operation of the charter, or deprive the corporation of the fruits, actually reduced to possession, of contracts lawfully made."

Citing and quoting:

Miller vs. State, 15 *Wall.,* 498.

Holyoke Co. vs. Lyman, Ib., 519.

Tomlinson vs. Jessup, Ib., 459.

Ry. vs. Maine, 96 *U. S.*, 510.

Shields vs. Ohio, 95 *U. S.*, 324.

Continuing, at page 721 the court say:

"Giving full effect to the principles which have thus been authoritatively stated, we think it safe to say, that *whatever rules Congress might have prescribed in the original charter for the government of the corporation in the administration of its affairs, it retained the power to establish by amendment.*

"In doing so, it cannot undo what has already been done, and can not unmake contracts that have already been made, *but may provide for what shall be done in the future,* and may direct what preparations shall be made for the performance of contracts already entered into."

The court illustrates this by saying that, although Congress might have originally prohibited the corporation from borrowing money on mortgage or the creation of any bonded indebtedness without an ample sinking fund for the payment of same, not having seen fit to do so at first, Congress could not, by amendment, vacate mortgages already made or invalidate bonds already issued—that, in short, *all such amendments must be prospective.* This was a case where the amendment was made by the original creating power, the Congress, but under a reservation similar in terms to that of our Constitution with regard to the regula-

tion of foreign corporations. It therefore affords a test in this case.

See also:

Spring Valley Waterworks vs. Schoetler,
110 *U. S.*, 347.

No clearer or simpler test has been proposed than that formulated in this case by the learned Chief Justice. Cases might be multiplied indefinitely; but we take it that one clear, unimpeached authority suffices. We deduce from that case the following rule for determining the validity of legislation, by way of amendment, alteration or repeal of corporate franchises, passed under a general reservation of power in that behalf:

That whatever restrictions, conditions and burdens the legislature might lawfully have laid upon the corportation in the original grant of power to it may be imposed upon it by way of amendment; provided:

(a) *That such restrictions, conditions and burdens be prospective in their operation.*

(b) *That they do not impair the contracts of the company already made or rights which have become vested under authority of its charter, and in the valid exercise thereof.*

In the provision of the Arkansas Constitution above quoted, the addition of the words "that no injustice shall be done to corporators" really adds nothing to the meaning of the provision which would not have been the law without such a proviso; and the rule, as above deduced from the *Sinking Fund Cases*, is the proper measure of this reserved power of the State of Arkansas.

In *Woodson vs. State*, 69 *Ark.*, 521, this reservation of the power of amendment, revocation or repeal of corporate privileges was before the Supreme Court in a case where a coal mining corporation contended that a certain statute requiring the weighing of coal was void, as restraining its right to contract. The court, per Riddick, J., says, at page 524:

"The citizen does not derive his right to contract from the legislature. The corporation does. And it possesses only such powers as are conferred upon it by legislative will; *and these, under our Constitution, are liable to be altered, revoked or annulled by the power that granted them.* (*Art.* 12, *Sec.* 6, *Const. of Ark.*) The plain purpose of this constitutional reservation was to keep corporations under legislative control. The only limitation on this power of the legislature contained in our Constitution is that the alteration, revocation or annullment must be made 'in such manner that no injustice shall be done to the corporators.' Speaking for myself only, it seems to me that this limitation, that no injustice shall be done to the corporators, is nothing more than would have

existed, in the absence of such words, from general rules of law. In the absence of such words, the courts would have implied the limitation that no injustice should de done to corporators, for the legislature can not confiscate the property of a corporation. This power to alter, revoke or annul 'can not be so used as to take away property already acquired under operation of the charter, or to deprive the corporation of the fruits, actually reduced to possession, of contracts lawfully made.' (*Sinking Fund Cases*, 99 *U. S.*, 700, 720; *St. L. I. M. & So. Ry. Co. vs. Paul*, 173 *U. S.*, 409.)

"But it can not be said to be unjust to the corporation for the State to exercise this reserved power by taking away either a part or all of the corporate powers of domestic private corporations, organized since the adoption of the constitutional provision above referred to, for the constitutional provision reserving such power enters into and forms a part of the corporate charters of such corporations. When the State alters or revokes the charter, when it takes away all or part of the corporate powers, it is only acting within the contract made with the corporators in the beginning."

And in construing the language "that no injustice de done to corporators," and applying the same to the statute there under consideration, the court says, at page 527:

"Whether injustice has been done to the incorporators depends upon the facts of each case in which an alteration or revocation of corporate powers has been attempted. But we do not see that the statute under consideration here is open to any such objection. *It was made to take effect ninety days after its pass-*

age, and was prospective in its operation. It did not interfere with vested rights or existing contracts or deprive such corporations of any property possessed by them."

It is important to observe that this reserved power of the State extends not only to the *alteration*, but to the complete *revocation or annullment* of corporate franchises. Even if the Act of 1905 had amounted to an instant and complete annullment of the appellant's franchises, it would be in no position to complain; for that contingency was contemplated by its contract with the State, and that power was reserved to the State. But the Act does not go to that length. It prescribes conditions, by observing which a corporation may continue in the State.

Furthermore, measured by the tests applied to the Act under consideration in the case last cited, the Act of 1905 can not be said to be "unjust to corporators." The only thing of which it could be said to have deprived appellant is its corporate franchise; and that is the very right which the State did reserve. Appellant took, by its contract, only a qualified property in that, subject to the exercise of the State's power of revocation at any time.

It further appears that the Act is prospective in all its terms, and indeed it did not take effect until

sixty days after passage. Thus it allowed sixty days of grace to all corporations not desiring to conform thereto within which they might leave the State. Appellant had the option to remain in the State or leave. It did the former; and we contend that, by so doing, it became bound, as by contract with the State, to exercise its franchises subject to the burdens and requirements of the Act of 1905.

Such has been the uniform construction placed by the Supreme Court of Arkansas upon Sections Six and Eleven of Article Twelve of the State Constitution, quoted *supra.*

That this reservation was a part of the contract between the State and the appellant corporation, see also:

Railway vs. Gill, 54 *Ark.,* 101.

Leep vs. Railway, 58 *Ark.,* 407.

The status, rights and liabilities of a corporation in Arkansas with reference to this reserved power are clearly fixed by the decision in *Railway vs. Leep,* 54 *Ark.,* 101. In that case, Mr. Justice Hemingway, one of the distinguished gentlemen who here appear of counsel for the appellant, construed the constitutional provisions above quoted and applied them to an Act of the General Assembly of 1887, regulating the fares to be charged on railways in the State.

The appellant, the St. Louis & San Francisco Railroad Co., was formed by consolidation of several companies, amongst which was the St. Louis, Arkansas & Texas Railway Co., which was organized in 1880. The laws then in force in the State provided for the regulation and fixing of rates in a manner substantially different from that fixed by the Act in controversy. The railroad company contended that, as to that portion of its road formerly owned by the St. Louis, Arkansas & Texas Railway Company, the State was bound by contract with the company to allow the rates to be governed by the laws existing in 1880. It was argued that the Act of 1887 was void because in conflict with Sections 6 and 11 of Article 12 of the State Constitution (*quoted supra*), and with the provisions of the State and Federal Constitution prohibiting the interference with vested rights and the freedom to contract, the taking of property without due process of law and the impairment of obligation of contracts. The court held the Act of 1887 valid. Mr. Justice Hemingway in discussing these phases of the case said, at pages 110-111:

"In the view we have taken of the law, it will be unnecessary to go into the discussion of the Act, as affected by the provisions of the Federal Constitution, relied upon by the appellant. When the St. Louis, Arkansas & Texas Railway in Arkansas was

organized, the Constitution of the State contained the following provisions: (*Quoting Secs. 6 and 11 of Art. 12 of the Constitution of Arkansas, quoted supra.*)

* * *

"Those provisions have ever since been and now are a part of the fundamental law of the State. *They entered into and became a part of the contract between the State and the corporations concerned in this cause. By their terms the State was authorized to alter, revoke, annul or repeal all charters of corporations thereafter created in this State, whenever, in the opinion of the General Assembly, such charter is injurious to citizens of the State.* The only limitation upon the power is that it shall not be so exercised as to do injustice to the corporators. It is provided that foreign corporations may be admitted to do business in the State upon certain conditions, and that upon compliance therewith they shall conduct their business subject to the same regulations, limitations and liabilities as like corporations of this State, and shall exercise no other or greater powers, privileges or franchises than may be exercised by like corporations of this State.

"The appellant purchased its line in this State subject to the provisions just mentioned. Though the statute then in force for the regulation of rates to be charged for the transportation of passengers (*Mansf. Dig., Sec.* 5473) permitted a higher rate to be charged than that allowed by the Act in question, *the appellant knew that all such Acts were subject to legislative change. Thus warned, it elected to come into the State and operate a railroad. It thereby undertook and became bound to do it according to the terms and conditions imposed upon domestic corporations. It bound itself to the State by contract that it would conform to such rates of charge as the State might fix, provided they worked no injustice to its corporators.* If the Act in question violates that provision, the Act must fail;

otherwise it must stand. *To all other objections that may be urged against the Act, it is sufficient to reply: Consensus facit jus.* We therefore pass without discussion the clauses relied upon in the Federal Constitution, and address ourselves to the single inquiry, Do the allegations of the answer disclose that the Act is unjust to the incorporators of the appellant?"

This decision goes to the very core of the case at bar and controls it. Learned counsel, unprejudiced by any duty as an advocate, saw and stated the proposition clearly. To apply his language, these provisions giving the legislature power to alter, revoke and amend charters, ever since the adoption of the Constitution, have been, and are now, a part of the fundamental law of the State. *"They entered into and became a part of the contract between the State and the corporation concerned in" this case. The appellant knew that the laws governing it were "subject to legislative change." "Thus warned, it elected to come into the State" and do business; and after the passage of the Act of* 1905, *it "elected" to continue business.* The conclusion is inevitable, then, as stated in counsel's own language, that *"it bound itself to the State by a contract that it would conform" to the statutes from time to time passed by the State in the exercise of its reserved right.* This is the law, solemnly declared by the learned judge, and its force can not now be evaded by him as counsel. The reason-

ing of this decision upon this point is unimpeachable and has never been departed from in this State. Indeed it is the universal rule.

Ordinarily a foreign corporation exists by sufferance, to the extent that it has no inherent rights outside the State of its creation, and may be entirely excluded by another State, or, if admitted at all, may be admitted on any terms which the State sees fit to prescribe. This power of the State is unlimited in the beginning and so remains unless qualified in the reservation of power which enters into the contract of the State and the foreign corporation.

Whatever be the extent of the power reserved to the State to lay new conditions upon foreign corporations, it becomes a matter of contract between the State and the corporation that it may be exercised to that extent.

The Constitution of Arkansas is somewhat peculiar in that it has made the powers of the State over the rights of domestic corporations the criterion of its powers over foreign corporations. But its powers over domestic corporations are reserved in sweeping terms, and extend to the repeal, revocation or annullment, as well as to the amendment or modification of their privileges—subject only to the proviso that no

injustice be done to the corporators. Such then is the contract between the State of Arkansas and the defendant.

It is a familiar proposition that a foreign corporation which comes into a State does so under an implied agreement to all the powers of the State reserved by its Constitution. These reservations vary in terms in different States. In many the power of revocation or annullment is reserved in unqualified terms. In others, as in Arkansas, the foreign and domestic corporations are placed upon the same footing. The principle of implied acquiesence in whatever reservation of power the State has thus made is recognized in many cases.

In *State vs. Standard Oil Co. of Ind.*, 91 *S. W.*, 1062, in a case involving the validity of that provision of the anti-trust Act of Missouri which relates to the production of witnesses and books by corporations, the Supreme Court of that State held that the whole Act was one of regulation, and that its provisions all became conditions to which the corporation gave implied assent by doing business in the State:

"It logically results from this recognized doctrine that a State may withhold or regulate and grant license to do business under legislative restrictions, not inimical to Federal prerogative relating to interstate com-

merce or other high Federal governmental functions. It is but taking one step further in the evolution of the argument to hold, as we do, that when a corporation, having no right to come into a State other than that of its own creation, for business purposes, except by virtue of its license and the expressed will of the State so invaded, does come into such State under a license, as in this cause, *a contract to obey existing laws pertaining to the granting of that license and the right to hold under that license is implied. In this view, the law must be read into the license, and in this view it is not going too far to hold that, when the Republic Oil Company of New York was granted and accepted a license to do business in Missouri, it agreed and contracted with this State that notice to appear and testify in any suit affecting that license or the right to do business thereunder, served upon its attorney of record in that case, should be deemed and taken as due notice to the corporation.* This is well within the reasoning of *Daggs vs. Ins. Co.*, 136 *Mo.*, 398."

Since the Arkansas law was copied from the Missouri law, in the first instance, this language is especially applicable in this case, as showing that the plaintiff in error was bound by an implied contract to produce its agents and books when called for by the State.

In *Waters-Pierce Oil Co. vs. Texas*, 177 *U. S.*, 28, the appellant, a foreign corporation, contended that the anti-trust Act of Texas was unconstitutional, because it limited its right to make contracts and took away the property and liberty assured by the 14th

Amendment. Besides, it was asserted that the statute made many unjust and oppressive discriminations between persons and classes of persons. In overruling these contentions, Mr. Justice McKenna says, at page 43:

"We are not called upon to answer those arguments, or to condemn or vindicate the statutes on this record. The plaintiff in error is a foreign corporation, and what right of contracting has it in the State of Texas? This is the only inquiry, and it can not find an answer in the rights of natural persons. It can only find an answer in the rights of corporations and the powers of the State over them. What these right are and what this power is have been often declared by this court."

Proceeding, the opinion cites and reviews the leading cases in this court from *Bank of Augusta vs. Earl*, 13 *Peters*, 519, to *Hooper vs. California*, 155 *U. S.*, 648, to the effect that the right of a foreign corporation to engage in business in a State other than that of its creation depends solely upon the will of such other State. Proceeding then, at page 46, the court say:

"*Nor can plaintiff in error claim an exemption from the principle upon the ground that the permit of the company was a contract inviolable against subsequent legislation of the State.* This contention was presented to the court of civil appeals and the court properly replied: 'After the Act of 1899 went into effect, the State granted to the appellant (the plaintiff in error here) authority to engage in business in the State for a period of ten years. The Act of 1899, as

well as that of 1905, provides for the forfeiture of the permit of a foreign corporation which may violate any of the provisions of the statute. The statute in force at the time the appellant entered the State informed it that, for a violation of its terms, the permit to do business would be forfeited. This provision of the law was as much a part of the obligation, and as binding upon the appellant, as if it had been expressly made a part of the permit.'

"*The statute of* 1899 *was, therefore, a condition upon the plaintiff in error, within the power of the State to impose, and whatever its limitations were upon the power of contracting, whatever its discriminations were, they became conditions of the permit and were accepted with it.*"

It is immaterial that in Texas the power of amendment or revocation as to foreign corporations seems to have been reserved in absolute terms; while in Arkansas it is co-extensive only with that as to domestic corporations. The principle is the same; and if in Texas the corporation is held to have assented to the reservation, the same is true in Arkansas.

In *Keystone Driller Co. vs. Superior Court,* 138 *Cal.,* 738, it was held that the Parasio Company, a foreign corporation, when it elected to come into the State of California to transact business, was *presumed to know its laws and to have agreed to comply therewith.* This case is rather an extreme application of the power of the State to lay burdens and impose disabilities upon foreign corporations. The court up-

held a statute denying to a foreign corporation the use of the courts, either as plaintiff or defendant, where it had failed to comply with the law as to filing articles, etc.

See also:

St. Clair vs. Cox, 106 *U. S.*, 350.
Frawley vs. Pa. Gas Co., 124 *F.*, 262.

Authorities upon this point might be multiplied indefinitely; but we think that the principle is so clear that such elaboration is not necessary.

These cases clearly fix and uphold the power of the State to exercise its reserved right, as a part of the contract of the corporation with the State.

The cases of *Ry. Co. vs. Gill*, and *State vs. Standard Oil Co., supra*, go further and declare that, as corollary to that power, the corporation is bound, as by contract with the State, to submit to the exercise of this reserved power and to comply with the laws passed thereunder.

We next call attention to a case which states another principle which logically flows from those thus mentioned—i. e., that when the State does exercise this power and prescribes new conditions, the corporation must leave the State or comply with the new conditions.

In *Hartford Fire Ins. Co. vs. Perkins*, 125 *F.*, 502, certain insurance companies attacked as unconstitutional the anti-compact Act of South Dakota which, in terms very similar to the Arkansas statute under consideration, forbade combinations between insurance companies. The right of the State to admit or exclude foreign corporations at will is discussed at length; and the conclusion is reached that the companies had no right to challenge the validity of the statute on constitutional grounds. In summing up his conclusions, Calland, D. J., says:

"Clearly these complainants have the option either to cease business in the State of South Dakota, or comply with the law in question."

An appeal from this decision was taken, but dismissed on motion of appellant.

See:

196 *U. S.*, 643.

The language above quoted applies with equal force to the case at bar. The appellant came into Arkansas under an implied agreement that the State might, from time to time, alter its laws as to corporations, even to the extent of annulling the right of appellant to do business in the State; and it assented to this power of the State; and when the Act of 1905

was passed, it had the option to stay and comply with the requirements of the Act or leave the State. It elected to stay; and it has thereby assented to the burdens and conditions imposed by the Act, and can not now complain that Sections Eight and Nine compel it, when called upon by the State, to produce witnesses, books and papers under its control and relevant to the issue as to whether or not it has violated the Act of 1905 by doing business in Arkansas while a member of an illegal combination.

Nor can it complain that the Act of 1905 provides for the revocation of the right to do business in the State if, after the Act of 1905 took effect, it did business in Arkansas while a member of an illegal combination.

Returning particularily to Sections Eight and Nine, we maintain and have argued elsewhere in this brief that they are thoroughly valid under the 14th Amendment, as to all classes of defendants embraced within the terms of the Act—i. e., as to persons and partnerships as well as to corporations. But, if this were any less true than it is, the provisions would still be valid as to corporations.

By coming into the State, a foreign corporation assents to the exercise of the reserved power of the

State; and by remaining in the State, after the passage of an Act in the exercise of this power, it assents to it. In the language of Judge Hemingway, in the Gill case, *"Consensus facit jus."*

This principle is a full and complete answer to the argument that Sections Eight and Nine deny the equal protection of the laws or the due process of law to appellant.

II.

THE VALIDITY OF SECTIONS ONE AND TWO.

Plaintiff in error has attacked the constitutionality of Sections One and Two of the Act of 1905, in its 1st, 2d, 7th, 8th, 20th and 21st assignments of error.

The first assignment of error asserts that Sections One and Two of the Act of 1905 are violative of the due process phrase of the 14th Amendment, in that the judgment herein rendered is for a penalty assessed against plaintiff in error on the ground that it is a member of a combination such as is described in said Section One, made wholly without the State of Arkansas, and not affecting business done therein—in brief, that the judgment is one based upon an extra-

territorial act, and holding it liable for acts done outside the State of Arkansas.

The second assignment of error asserts that Sections One and Two of the Act of 1905 are violative of the equal protection phrase of the 14th Amendment, in that:

(a) The judgment herein rendered is one based upon extra-territorial acts of the plaintiff in error—i. e., upon combinations made outside the State of Arkansas and not affecting prices in said State. And,

(b) The judgment was an enforcement of a statute which would be invalid as to domestic corporations or individuals.

The seventh assignment of error alleges that Sections One and Two are "repugnant to Section Ten, Article One, of the Constitution of the United States, and in violation of that portion of said section which provides that no State shall pass any *ex post facto* law."

And the eighth assignment alleges that the said section violates the same section of the Constitution in that portion thereof "which provides that no State shall make any law impairing the obligation of contracts."

Both these assignments proceed upon the declaration that the statute attempts to penalize acts done outside the State of Arkansas.

The twentieth assignment of error alleges that Section One is violative of the due process phrase of the 14th Amendment, because it penalizes acts done outside the State, and that the Supreme Court of Arkansas has held that it is invalid as to domestic corporations and natural persons, but valid as to foreign corporations.

And the twenty-first assignment of error alleges that the same section is in violation of the equal protection phrase of the 14th Amendment, for the same reasons.

When analyized, the 1st, 2d, 20th and 21st assignments are reiterations of three main propositions:

1st. That Sections One and Two of the Act prohibit and punish acts committed outside the State of Arkansas; and that thereby the plaintiff in error was denied the due process of law.

2d. That Sections One and Two are void as to domestic corporations and natural persons, for the reason that they punish extra-territorial acts; and that their application to foreign corporations is a denial of

the equal protection of the laws guaranteed by the 14th Amendment. And,

3d. That the Supreme Court of Arkansas has held the Act to be invalid as to domestic corporations and individuals, but valid as to foreign corporations.

And the seventh and eighth assignments involve these propositions:

1st. That Sections One and Two prohibit and punish extra-territorial acts.

2d. That they are *ex post facto*. And,

3d. That they impair the obligation of contracts.

The general proposition upon which all are based is that the Act of 1905 prohibits and punishes extra-territorial acts. We, therefore, first inquire:

Does the Act prohibit and punish extra-territorial acts?

An examination of the first cause of action set out in the complaint (which is the basis of the judgment here), fails to bear out this assertion of plaintiff in error.

The allegations of fact therein contained are:

That on the days named the defendant was transacting and conducting business in Arkansas, and that on said days it

"Had created, entered into and became, and was then, a member of and a party to a pool, trust, agreement, combination, confederation and understanding, with certain other corporations, partnerships, etc., * * * (naming them) * * * to regulate and fix the selling price of certain articles of manufacture, merchandise, commodity and convenience, to-wit: (naming them), contrary to the form of the statute in such cases made and provided, etc."

There is nothing in this language to bear out the assumption of these assignments of error that the combination was one "made wholly without the State of Arkansas, and in no way affecting their business within said State or put into effect therein."

No allegation is made as to where the combination was formed or as to the territory which it affected.

Hence, we submit, there is nothing in the record here which justifies these assignments of error. They are based upon a wholly suppositious state of facts, not borne out by the record. This is a sufficient answer to them, if they had correctly assumed that Sections One and Two, in their broadest construction, provide

for the punishment of an extra-territorial offense. But here, again, learned counsel have erred.

The Supreme Court of Arkansas has said that the substantive act penalized by the Act of 1905 is the doing of business in Arkansas while a member of a combination to fix or control prices; and that, regardless of where the combination is formed, a corporation which does business in Arkansas while a member thereof violates the Act of 1905. The doing of business in Arkansas and not the formation of the combination is the gist of the prohibited act.

This was the construction placed upon the Act in *Hartford Ins. Co. vs. State*, 76 *Ark.*, 303. That was the first case in which the Supreme Court of Arkansas had occasion to construe the Act of 1905 here under consideration.

Suit was brought by the Attorney General in the Circuit Court of Pulaski county against the insurance company, to oust it from the State and subject it to the penalties of the Act of 1905. The complaint stated in substantially the language of the Act that the company was a member of and a party to a pool, trust, agreement, combination, confederation and understanding to regulate and fix the premiums for fire insurance; and that it was transacting and conducting

business in Arkansas, while thus a member of and a party to said combination. There was no allegation as to where the combination was formed, or that it did or did not affect rates in Arkansas. The company filed a motion to require the complainant to state whether the alleged combination was formed within or without the State, and whether the purpose was to regulate premiums within or without the State. This motion being denied, the defendant answered, alleging that it was not a member of a combination entered into in the State of Arkansas, to fix or control premiums anywhere, and that it was not a member of a combination, formed in Arkansas or elsewhere, to fix premiums in Arkansas. The State demurred to this answer and the demurrer was sustained; and the company electing to stand upon its answer, judgment was rendered against it.

It will be observed that the denials of the answer are not responsive to the allegations of the complaint, in that the complaint alleges that the defendant was doing business in Arkansas while a member of a combination to fix premiums; while the answer simply denies any combination made in Arkansas to fix rates anywhere, or any combination made anywhere to fix rates in Arkansas.

An appeal was prosecuted to the Supreme Court of Arkansas, where the judgment of the circuit court was affirmed. Mr. Chief Justice Hill, in a very able and exhaustive opinion, after full consideration of the previous history of anti-trust legislation in the State, and of all the other legitimate aids to the construction of the Act, held that the gist of the offense denounced was the doing of business in the State while a member of a combination, and not the formation of the combination, or its territorial scope. At page 307 it is said:

"These are the questions involved:

"1. Does the Act prohibit, under the penalty named therein, a foreign insurance corporation from doing business in Arkansas while such corporation is a member of a pool, trust or combination to fix insurance rates anywhere, although such pool, trust or combination is not created or maintained in Arkansas, and does not affect or fix, or attempt to do so, rates of insurance in Arkansas. To state the proposition by illustration: Assume that the appellant is a member of a trust—called a rating bureau—created and maintained in New York city, to fix and maintain insurance rates in New York city and St. Petersburg, but which does not fix or affect rates in Arkansas, is it guilty of a violation of the Act, if it transacts an insurance business in Arkansas, upon complying with all the statutes of the State, except the one at bar?

"2. If the Act reaches to and makes unlawful the transaction of an insurance business in Arkansas by a foreign insurance corporation while belonging to a pool, trust or combination to fix or affect rates in

other places than Arkansas, but not in Arkansas, is the Act constitutional, and is it within the power of the State to enact it?"

Proceeding, the opinion, in reference to the first of the questions above stated, reviews at length the various considerations which influence the construction of the Act and throw light upon the legislative intent, and at page 311, thus answers the questions:

"These facts render the conclusion irresistible: that the General Assembly *intended to render unlawful the doing of business in this State by any corporation, when such corporation belonged to any trust to fix prices anywhere, when it passed this Act.* Whether the moving cause for this demand was wise or foolish, whether the Act will promote the general welfare or bring wreck and disaster in its enforcement, are questions with which the courts can not deal. These questions are addressed to other departments of the government; and when the intention of the lawmakers is discovered, either in the language employed or from the language aided by a search into the intention, from the history of events, the duty of the court is plain. When this history is considered, in connection with the language used in this Act, then the ambiguity, uncertainty and obscurity resulting from the confused terms of the statute are cleared away, and the construction heretofore indicated made certain to be the construction intended, and such construction is conformable to the language employed, and not in violence to any part of it. *It being plain that the General Assembly intended by this Act to subject to the penalty of it any foreign corporation doing business in this State while a member of a trust formed to fix prices anywhere,* it remains to consider the constitutionality of it."

This then is what the Act of 1905 means, because the Supreme Court of Arkansas, exercising its right to construe the statutes of the State, has so declared; and such construction is conclusive and not subject to review here. This is a clear and indisputable principle, often announced by this court. So we will content ourselves with citing one clear decision upon the point. We refer to the case of

Waters-Pierce Oil Co. vs. Texas, 177 *U. S.*, 28.

That was a case arising under the anti-trust laws of Texas. The company was charged with an illegal and monopolistic combination to control the price of oils, and suit was brought to oust it from the State. The section of the Texas anti-trust Act under which ouster was sought provided that: "Every foreign corporation violating any of the provisions of this Act is hereby denied the right and prohibited from doing business within this State." And it is made the duty of the Attorney General to enforce this provision.

At the trial the court, by directions to the jury, withdrew all acts of interstate commerce from its consideration. Judgment of ouster was rendered; and on appeal to the Supreme Court of the United States, the company contended that the Texas statute was unconstitutional, because the language used in the above

quoted section was broad and general enough to include inter-state as well as intra-state commerce. This court held that the Act was valid, saying, at pages 43-44:

"The claim is, as we understand it, that the statute prohibits all business of foreign corporations, and hence is unconstitutional, as including inter-state business, and can not be limited by judicial construction to local business and the unconstitutional taint thereby removed. To sustain this contention (certain decisions of the Supreme Court of the United States there named) and some others are cited. They do not sustain the contention. The interpretation of certain statutes of the United States was involved, and the court, finding the meaning of these statutes plain, decided that it could not be changed by construction, even to save the statutes from unconstitutionality. This was but an exercise of judicial interpretation.

"The courts of Texas have like power of interpretation of the statutes of Texas. What they say the statutes of that State mean, we must accept them to mean, whether it is declared by limiting the objects of their general language, or by separating their provisions into valid and invalid parts."

As sustaining this view the court cites the following cases:

Tullis vs. Lake Erie and W. R. Co.,
175 *U. S.*, 348.

St. L. I. M. & So. R. Co. vs. Paul,
173 *U. S.*, 404.

See also:

Armour Packing Co. vs. Lacy, 200 *U. S.*, 226.

We submit that the construction of Sections One and Two of the Act of 1905, thus fixed by the Supreme Court of Arkansas, precludes the consideration here of any objection, made in the assignments of error, based upon the alleged extra-territorial features of the Act. The substantial act penalized by the Act is the *doing of business in Arkansas*, which, of course, was not an extra-territorial act.

The elimination of the extra-territorial construction which plaintiff in error attempts to force upon the Act, carries with it these constitutional objections; for they are expressly based upon the theory that the Act is extra-territorial.

But we have no desire to evade the question in any shape that it might have been presented; and we shall consider *seriatim* the various constitutional provisions which are cited against the validity of Sections One and Two of the Act.

We next proceed to inquire:

Did the Supreme Court of Arkansas hold that the Act was invalid as to domestic corporations or individuals?

The answer to this assumption on the part of the plaintiff in error is to be had on an examination of the

judgment and opinion of the Supreme Court of Arkansas in this case. (Record, pp. 53-61.) No such conclusion is there intimated. It is there stated, upon the authority of the *Hartford Ins. Co. vs. State,* 76 *Ark.,* 303, that the rule of *stare decisis* forbids a re-examination of the question as to the validity of Section One of the Act of 1905. And in the *Hartford Insurance Company case* the court did say that the statute was a valid regulation upon foreign corporations, imposed under the reserved power of the State in that behalf. But it was never intimated or held in either case wherein the Supreme Court of Arkansas considered the Act of 1905, that it was invalid as to domestic corporations or individuals.

But in construing the Act of 1899 (known as the Rector anti-trust Act) the Supreme Court of Arkansas did say that, as to natural persons, an Act which punished a combination made outside the State would be unconstitutional, to that extent.

See:

State vs. Lancashire Ins. Co., 66 *Ark.,* 466, 477.

The Rector Act, in describing the combinations prohibited, used the words "any pool, trust, etc." The court held that the word "any" as used there did

not include a combination formed outside the State of Arkansas.

To meet this difficulty the Act of 1905 was passed, re-enacting the provisions of the Rector Act, changed by the insertion of the words designed to meet the difficulty pointed out in *State vs. Lanschire Ins. Co.*, 66 *Ark.*, 466, and making it applicable to combinations formed anywhere.

The language in so far as it describes natural persons as being within the prohibitions of the Act is unchanged. Hence there is some ground for saying that the Act of 1905, as applied to natural persons, would not be valid in so far as it punished combinations made outside the State.

But in none of these cases—which are the only ones wherein the Supreme Court of Arkansas has ever, in any way, passed upon the validity of any of the provisions of Section One of the Act of 1905—is it even intimated that they are not valid as to domestic corporations; and that much of the premise of the assignment of error is pure assumption.

We shall presently answer the proposition that, if some of the provisions of the Act of 1905 may be invalid as to natural persons, the statute is void as

being violative of the equal protection clause of the 14th Amendment. But, there being several arguments advanced under the authority of the 14th Amendment, we will consider them in the order of their assignment.

We therefore next inquire:

Are Sections One and Two violative of the due process or equal protection guaranteed by the 14th Amendment?

The first assignment of error alleges that these sections are violative of the due process phrase of the 14th Amendment; and the second, that they are violative of the equal protection phrase of the same Amendment.

The twentieth and twenty-first assignments are substantial reiterations of the first and second respectively, except that in both of them is added this statement: that the Supreme Court of Arkansas held that, even though the Act might be invalid as to domestic corporations and natural persons, it was valid as to foreign corporations; and it is urged that this was a denial of both due process of law and the equal protection of the law as guaranteed by the 14th Amendment.

We have noted above that the Supreme Court of Arkansas did not decide or intimate that the Act would not be valid as to domestic corporations.

All these objections based upon the 14th Amendment find a full answer in the fact that the plaintiff in error is a corporation, and a foreign corporation, and that the Act of 1905 is an Act of regulation imposed upon corporations in general.

In *Hartford Ins. Co. vs. State*, 76 *Ark.*, 303, cited *supra*, Mr. Chief Justice Hill, in answering the question as to the contstitutionality of the Act, construed as therein indicated, says, at pages 311, 312:

"In *Lancashire Ins. Co. vs. State*, 66 *Ark.*, 466, the court, in construing the Rector Act, said: 'As the legislature has the power to entirely exclude foreign insurance companies from doing business in this State, it can, of course, dictate the terms upon which such companies may do business here. The whole mater rests in the discretion of the legislature.'

"This Act requires every corporation doing business in this State to annually make affidavit that it does not belong to any trust described in the first section of it, to fix prices in this State or elsewhere; provides for prosecutions against them, for failure to make such affidavit and for the right to do business to be forfeited; and in other ways clearly indicates that it shall be unlawful to do business in this State while belonging to a trust to fix prices anywhere. It gave sixty days to corporations then doing business to come within its terms, and thereafter it was unlaw-

ful to transact any business in this State while maintaining a membership in a trust anywhere, to fix prices anywhere. In the language of the Lancashire case, the State has dictated these terms upon which foreign insurance companies can do business in this State. Limiting the decision entirely to the facts before the court, it is held that *the State has declared, and possesses the right to declare, that foreign insurance corporations can not do business in this State while belonging to a pool, trust, combination, conspiracy or confederation to fix or affect insurance rates anywhere.*"

We have, in the first main division of this brief, considered at length the constitutional power of the State, under its reservation in that behalf, to impose conditions upon foreign and domestic corporations. We have shown that, though, in Arkansas that power over a foreign corporation, when it has once come into the State, is limited to that of the State over domestic corporations, the latter power being practically unlimited, the State may prescribe any new condition upon foreign corporations which is prospective in its operation, does not impair rights legitimately vested or contracts legitimately made under existing Acts, and which applies in like terms to domestic corporations. We have further shown that the Act of 1905, throughout, applies alike to foreign and domestic corporations, imposing upon both the same burdens and in the same terms. We have shown that the plaintiff

in error entered the State of Arkansas under an implied agreement that these reserved powers might be exercised at any time, and that by remaining in the State after the Act of 1905 took effect it assented to its terms.

We have further shown that the Act of 1905 has been held by the highest court of Arkansas to be an Act for the regulation of corporations.

In view of these propositions, it seems to us that the invocation of the 14th Amendment upon the point under discussion is wholly without support of reason or fact.

In the light of the construction of the Act as fixed by the highest court of Arkansas, and of the reserved power of the State to regulate or repel corporations when it deems it best for the public good so to do, it was clearly competent for the Legislature of Arkansas, by a general Act such as this one, to declare that no corporation—foreign or domestic—should do business therein if it was a member of a combination to fix prices anywhere; and that if it did so do business in Arkansas, it should be penalized and ousted.

It is purely a matter of legislative policy, with which the courts will not concern themselves. If the Legislature of Arkansas conceived that it was danger-

ous to the public welfare for corporations which were members of combinations elsewhere to do business in Arkansas, it had the right to prohibit it. Indeed there is much wisdom in the idea that, if a corporation is a member of a trust which controls prices in Missouri and Tennessee and other adjoining States, its prices in Arkansas will be affected by these agreements, even though it protests that none of its combinations have for their purpose the fixing of prices in Arkansas.

The rights of the plaintiff in error in Arkansas are referable to its contract with the State and are taken subject to it. Any foreign corporation entering that State makes a contract with the State whereby it assents that the State may, at any time, exercise the right to amend or repeal the statutes governing its rights, so long as the statutes in that behalf apply equally to domestic corporations.

The only basis for the contention that the Act prohibiting combinations is violative of the due process clause of the 14th Amendment is that it is an infringement of the corporation's right to contract. But since the foreign corporation comes into the State with the understanding that its rights may be modified, limited or denied at any time, it is estopped to complain that the State exercised its reserved rights in that behalf.

Indeed, independently of the foregoing, which we deem a conclusive answer to the objection that the statute is violative of the due process of law clause, it is clear that there is nothing in the general nature of anti-trust legislation which renders it obnoxious to that clause of the 14th Amendment. Such laws are valid exercises of the police power of the State.

In 9 *Fed. Stat. Ann.*, 460, it is said:

"Statutes which are directed to the prohibition of combinations to restrict trade, or in any way limit competition in the production and sale of articles, or to increase or reduce their prices, in order to preclude a free or unrestricted competition in them, enumerating and forbidding the various ways in which these purposes can be accomplished, do not violate this (the due process) clause of the Constitution."

In *National Cotton Oil Co. vs. Texas*, 197 *U. S.*, 115, it was objected that the anti-trust Act of Texas was invalid, as an interference with the freedom of contract, and hence a deprivation of property without due process of law. This court, in an able opinion by Mr. Justice McKenna, held that the statute was valid as an exercise of the police power of the State.

See also:

Smiley vs. Kansas, 196 *U. S.*, 447.
State vs. Standard Oil Co., 91 *S. W.*, 1062.

We therefore think it clear that the first and second sections of the Act of 1905 are not violative of the due process clause of the 14th Amendment.

Are they violative of that clause which guarantees the equal protection of the laws, as alleged in the twenty-first assignment.

As we have already said, neither Sections One and Two nor any other portions of the Act of 1905 contain any discriminating features, as against any class or parties embraced within the terms used.

The prohibitions of Section One are directed at

"Any corporation, organized under the laws of this or any other State or country, and transacting or conducting business in Arkansas, or any partnership or individual or other association or persons whatsoever."

And the penalties of Section Two apply to the same parties.

It is clear that the law applies equally to *foreign and domestic corporations doing business in the State;* and that, in so far as natural persons are concerned, they too are included in every prohibition which reaches corporations.

The rights of a corporation—and especially of a foreign corporation—to do business in Arkansas lie

in grant from, or contract with, the State. They are derived from the State. Not so with individuals. Hence it may be that the provisions which prohibit natural persons as such from doing business in Arkansas while members of a combination outside the State would be invalid.

But the rights of the corporation are not to be measured by those of the individual. They are to be measured and tested by the contract between the State and the corporation.

Hence, for all purposes of this argument, it might as well be true that the Act of 1905 had been construed, as to natural persons, as prohibiting only those combinations made in Arkansas or affecting business in Arkansas, and as being invalid in so far as it may seem to punish acts done wholly outside the State. Grant that such is the effect of the decision of the Arkansas court. Does it follow that the "equal protection of the law" makes necessary a like construction as to corporations? We think that it is clearly not so.

In *National Cotton Oil Co. vs. Texas*, 197 *U. S.*, 115, this court held that certain discriminating features of the Texas anti-trust law having been held invalid by the Spureme Court of that State, and the law in other respects held still operative and valid, and the

provisions thus left in effect containing no discriminating features, the statute did not deny the equal protection of the laws to those embraced within its valid terms.

And, in 9 *Fed. Stat. Ann.*, 598, the same rule is thus summarized:

"A State anti-trust law, which contains no discriminating features, or the discriminating features of which are held by the State Supreme Court to be invalid, is not invalid as depriving any person or corporation of the equal protection of the laws."

Granting that the Arkansas Act of 1905, as to natural persons, would be limited by construction to combinations formed in or affecting the State, and invalid as to extra-territorial acts, the Supreme Court of that State has, none the less, as to corporations, given it a construction which eliminates the objection of extra-territoriality.

Hartford Ins. Co. vs. State, supra.

Hammond Packing Co. vs. State, 82 *Ark.*, 519.

If, then, as to corporations, it contains no discriminatory features, it does not deny the equal protection of the laws.

Considering the Act of 1905 to be what the Supreme Court of that State has said it is—an Act of

regulation on corporations—upon general principles, all that is required of it is that it operate upon all corporations in the same class equally. The Act of 1905 operates equally upon foreign and domestic corporations, and we submit that it does not deny the equal protection of the law.

We think that Sections One and Two stand every objection based upon the 14th Amendment proposed by learned counsel.

We therefore proceed to enquire:

Are Sections One and Two violative of Section Ten, Article One, of the Constitution of the United States, as being an ex post facto law or one impairing the obligation of contracts?

An *ex post facto* law is one which makes criminal an act already done. It is perfectly plain that this is not true of the Act of 1905, because it is prospective in its terms and operation throughout. Furthermore, the Supreme Court of Arkansas, exercising its function of interpretation of the statutes of this State, has said that the substantive act penalized and prohibited is the doing of business in the State *after the Act took effect* and while in a certain prohibited status. Clearly this is not an *ex post facto* law.

Does it impair the obligation of a contract? We are not favored with any specific information as to what contract it is alleged to impair. If it is that between the State and the corporation, the answer to the objection is found in the fact that, as a part of that contract, the State reserved the very power which it has in this Act exercised. If the objection means some contract of the plaintiff in error made while doing business here, it has failed to point out the contract; and we can not now test the law by consideration of what might be the rights of parties upon merely supposable states of fact.

But, after all, any one who deals with a corporation does so with notice that its rights and even its existence are subject to the reserved power of the State to amend, alter or repeal the laws under which the corporation claims any particular rights.

In conclusion, upon the objections made by the assignments of error directed to Sections One and Two, we respectfully submit that they are all either founded on unwarrantable and forced constructions of same, or wholly answered by a proper conception of the reserved power of the State over corporations.

III.

THE VALIDITY OF SECTION EIGHT OF THE ACT OF 1905.

The third, fourth, ninth and tenth assignments of error are directed at Section Eight of the Act of 1905. We have hereinbefore quoted this section in full.

The third assignment of error alleges that Section Eight of the Act of 1905 is repugnant to the due process clause of the 14th Amendment because it requires the plaintiff in error to produce witnesses, books, papers and documents to be used as evidence against itself, without providing for the defraying of the expense incident thereto.

And the fourth assignment alleges that, for the same reason, said Section Eight is violative of the equal protection clause of the 14th Amendment.

This question was not argued or decided in the State courts. An examination of the assignments of error in the motion for a new trial in the Pulaski Circuit Court (Record, 37-40) shows that it was not presented to the Supreme Court of Arkansas for consideration; and an examination of the opinion of that court (Record, 54-61) shows that no such question was decided or considered by it. We therefore submit that

it is not before this court for decision, upon this record.

But, if it were properly here for review, a conclusive answer to it is to be found in the fact that in reality the order of examination and production does not require of plaintiff in error the expenditure of any money in order to comply therewith.

The Supreme Court of Arkansas, in the opinion delivered in this case, thus construed the provisions of Section Eight of the Act:

"If these provisions mean that the corporation must be a policeman and bring into court, on demand, its president, bookkeeper or doorkeeper, *vi et armis*, certainly it would be an unreasonable imposition. An analysis of the provisions, however, will not justify such construction. *These sections evidently mean this and nothing more: that the corporation shall, on demand, request any given officer, agent or employe to be present at the time named for examination as a witness* (and, in case of productions of books and papers, that the given officer or agent produce the given papers); and, on failure to comply with these requirements, that it be defaulted. *Of course this contemplates an honest effort to produce the testimony called for. When that is made, then the statute is complied with.* When it is not, as in this case, where the defendant corporation refused to obey any part of the order, then the statute is not complied with." (Record, 57.)

Hammond Packing Co. vs. State, 81 *Ark.*, 540-1.

This is what the Supreme Court of Arkansas has said that these provisions of the Act of 1905 mean; and on that question its decision is final.

National Cotton Oil. Co. vs. Texas,
197 *U. S.*, 115.

So far as concerns the plaintiff in error, there are no expenses to defray. Its duty would have been done if it had requested the persons named in the order of examination to appear and made an honest effort to have them do so. These witnesses, under the general statutes of Arkansas, would have been entitled to their attendance fees and mileage.

Kirby's Digest, Secs. 3520-3526.

All the witnesses named in the commission were residents of Chicago; and, in order to secure their attendance the more readily, the Attorney General requested that the place of examination be fixed at Chicago.

Under these circumstances, it is difficult to see in what manner the plaintiff in error could possibly have been put to any expense in complying with the order of examination.

A like contention was made in the case of *Consolidated Rendering Co. vs. State of Vermont*, decided by this court January 6, 1908.

In that case, pursuant to a statute of the State of Vermont, notice was served upon the company to produce certain records in an investigation by the grand jury. The company failed to produce most of the papers demanded and was fined for contempt.

An appeal was taken to the Supreme Court of Vermont; and, amongst other objections, it was there urged that the statute was in violation of the 14th Amendment, because it provided no compensation for the time, trouble and expense of the company in producing the papers demanded. The State Supreme Court held that general provisions of the statutes of Vermont were ample to guarantee the payment of attendance fees and mileage of all witnesses necessary for the production and identification of the documentary evidence. And it was further held that the mere inconvenience, expense and trouble incident to the performance of certain public duties, such as attendance as witnesses, jurors, etc., are incidental burdens of the social compact; and that, on principle, the trouble and expense of their performance, at the command of the State and for its benefit, are not within the operation of the 14th Amendment.

In re Consolidated Rendering Co. (*Vt.*), 66 *Atl.*, 790.

The case was brought by writ of error to this court and the same objection was again pressed here; but, upon the ground that the order which commanded the production of the documentary evidence, without providing compensation for the time, trouble and expense thereof, constituted a taking of private property for public use without compensation, Mr. Justice Peckham, in discussing and overruling this objection, says:

"The next objection relates to the claim that the statute provides no compensation for the time, trouble and expense imposed upon a corporation in a foreign State or county in collecting and sending the documents demanded to the State of Vermont, and that it thereby takes, if enforced, private property for public use without compensation. The prohibition to that effect is found in the 5th Amendment to the Federal Constitution. Here again we meet the question whether that amendment, because of the subsequent adoption of the 14th Amendment, applies to a State proceeding; but for the reason already stated we do not find it expedient to discuss it here. We do not say that in any event a witness is entitled to compensation in order to meet the requirements of the above constitutional provision, but the Supreme Court in this case has held that the general law of the State in reference to the compensation of witnesses applied to this statute. The answer which the counsel for the company makes is that neither the statute nor the notice required the attendance of any one as a witness, but was merely an order for production for which no compensation was provided, either by the statute or under the general law. But the papers can not walk into court themselves; and when they are brought there by

virtue of the notice to produce served on the company, and they are given to some person by the company for the purpose of such production, he has a right to be sworn as to the papers which he produces for the purpose of identification, if nothing else, and the State court has held that he is entitled as a witness to compensation."

We think that these decisions amply meet the objection if it had been properly taken in the court below and were sustained by the facts in the case. But in point of fact, the question, never having been presented to or passed upon by the State court, is not here for review; nor do the facts as reflected by the record warrant the assumption that the plaintiff in error was ever called upon to make any expenditures in complying with the order.

These assignments of error (Nos. 3 and 4) which are directed to this proposition, assert, as based thereon, the conclusion that the judgment rendered for disobedience of the order of examination is violative of the due process and equal protection clauses of the 14th Amendment, respectively. The major premise of the argument in both assignments is that Section Eight is void because it does not provide for the payment of certain expenses; and, with that argument, falls also the conclusion that, for that reason, the judgment rendered in pursuance to Section Nine is violative of the 14th Amendment.

This brings us to the consideration of the ninth and tenth assignments of error, which are also directed against Section Eight.

The ninth assignment of error asserts that the order of examination made pursuant to Section Eight constituted an unreasonable search and seizure, and hence deprived the plaintiff in error of its property without due process of law, in violation of the 14th Amendment.

That the guaranty of the 4th Amendment against unreasonable searches and seizures does not apply to corporations at all, is settled in *Hale vs. Henkle*, 201 *U. S.*, 43. But we shall answer it as if this were not true.

This assignment is an attempt to tack together the guaranties of the 4th and 14th Amendments.

The 4th Amendment to the Constitution of the United States guarantees "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures." The 14th Amendment contains no such guaranty.

That the 4th Amendment is not a limitation upon the States, but solely upon the Federal Government, is too well settled to require argument.

9 *Fed. St. Ann.*, 249, *and cases cited.*

This assignment must proceed upon the theory that the guaranty of due process of law, contained in the 14th, and operating as a prohibition upon the States, includes and carries with it the illegal search and seizure guaranty of the 4th Amendment.

Not having, at this time, been favored with a copy of the argument of counsel for plaintiff in error, we have no means of knowing how seriously they will contend for this conclusion. But it seems to us that a correct conception of the history, scope and purpose of the two amendments answers the question fully. The 4th and 5th Amendments were adopted as limitations upon the Federal Government. The 4th contains the guaranty against illegal search and seizures. The 5th contains the guaranties of indictment or presentment by grand jury, as to double jeopardy, as to immunity of witnesses, due process of law, compensation for private property taken for public use; and the 6th and 7th Amendments contain further guaranties to the citizen against Federal action. The Constitutions of all the States contain these guaranties; and, in testing the validity of State legislation upon these principles, the State Constitution is and always has been the test.

If it be true, however, that the general phrases "due process of law," "equal protection of the law,"

etc., of the 14th Amendment extend all these provisions of the earlier constitutional amendments to the States, the Constitutions of all the States, in so far as they guarantee the rights of citizens, become mere surplusage, all these matters being already covered by the amendments to the Federal Constitution. To state this conclusion is to answer it. To sustain it would be to subvert the whole scheme of adjustment of the State and Federal powers.

This court has had this argument made to it before; but it has never been necessary to decide the proposition squarely. We shall presently show that it is not necessary to decide it here; but we wish first to direct attention to the latest utterance of this court upon the point.

In *Consolidated Rendering Co. vs. Vermont* (*Jan.* 6, 1908), referred to *supra,* Mr. Justice Peckham says:

"The objection that the notice authorized by the statute amounted to an unreasonable search and seizure of the private books and documents of the company is also not well founded. In *Adams vs. New York,* 192 *U. S.,* 585, where the question was raised, the court refused to discuss the contention that the 14th Amendment made the provisions of the 4th and 5th Amendments to the Constitution of the United States, so far as they related to the rights of the people to be secure against unreasonable searches and seizures, and to be protected against being compelled to testify in a criminal case against themeselves, privi-

leges and immunities of citizens of the United States of which they could not be deprived by the action of the State, because on an examination of the record the court concluded that there had been no violation of this restriction, either in the unreasonable search and seizure or in compelling plaintiff in error to testify against himself. We are of the opinion that there was no violation of such rights before us, and we think it equally unnecessary to decide the question which was left undecided in the Adams case."

We submit that, as in that case, there is here no necessity to decide the question; because there has been, in fact, no illegal search or seizure.

The Constitution of Arkansas (*Art.* 2, *Sec.* 15) contains a guaranty against illegal searches and seizures, similar in general terms to that of the 4th Amendment. In the argument of this cause below, it was contended that the order of examination in this case was violative of that provision. The Supreme Court of Arkansas pointed out very clearly that the reasonableness of the order, in so far as it related to the production of books and papers, was not properly before the court. Upon this point it is said, at pages 539-540:

"As to whether the order in question was an unreasonable search of appellant's books is not properly before the court under the facts. The order for the production of the books was coupled with an order to produce named witnesses for an examination, and J. Odgen Armour, one of those named in the order, was

the first witness called for oral examination. *Instead of producing him, or showing inability to do so, the appellant declined, in toto, to obey the order.*

"If appellant had obeyed so much of the order as required the production of witnesses for oral examination, or showed its inability to do so, and showed an attempt to comply with the order to that extent, and had refused to obey the order as to the production of books and papers, then the question would be squarely before the court for determination, whether the order in question amounted to an unreasonable search of books and papers. It is pointed out, in *Hale vs. Henkle,* 201 *U. S.,* 43, that a *subpoena duces tecum,* which practically called for all the books, papers and documents of a large business to be brought into court under a sweeping clause, was unreasonable and void, but the fact that it was void as to the production of books and papers did not justify its disobedience as to appearing to testify.

"In this case, the order is very broad, but its harshness is somewhat ameliorated by a proviso that, at the examination, the witnesses and books shall not be required to be produced, at any one time, in such numbers as to interfere with the business of the defendant. But, as indicated, it would be *obiter dictum* to determine the reasonableness of the order in question, in so far as the production of books and papers is concerned.

"Suffice to say, that the statute is valid, under Hale vs. Henkle, in so far as it authorizes a reasonable order for the production of books, papers and documents of a corporation over which the State has control, and what may be a reasonable order must be determined in each case as it arises."

Hammond Packing Co. vs. State, 81 *Ark.,* 519-539; *Record,* 56-57.

The facts, as stated in the foregoing quotation, are that the order for the production of books and papers, though broad, was expressly qualified by an injunction upon the commissioner *that neither books, papers nor witnesses should be called for, at any one time, in such numbers as to interfere with the business of the defendant.* This clearly relieved it of any unreasonableness arising out of its generality.

But, since the plaintiff in error elected to enter a general and sweeping refusal to produce any books, papers or witnesses, and did not wait to see whether the commissioner would enforce the order as to books and papers in an unjust or unreasonable manner, all questions of unreasonable search and seizure passed out of the case.

Indeed, if the propositions in the assignment of error under consideration were a legitimate issue in the case, we feel that the decision in *Hale vs Henkle,* 201 *U. S.,* 43, answers every objection as to the power of the State to pass an Act authorizing an order for the production, by a corporation, of its books, papers and documents. Under that decision, such an exercise of the visitorial powers of the State over corporations is thoroughly competent and not violative of the prohibition against illegal search and seizure.

See also:

State vs. Standard Oil Co. (Mo.),
91 *S. W.*, 1162.

In re Consolidated Rendering Co.,
66 *Atl.*, 790, 792.

Consolidated Rendering Co. vs. Vermont,
Mss. Op.

In the latter case, this court held that the order of production was valid, under the rule in *Hale vs. Henkle;* and that the question as to whether the order was broader than the statute justifies, was concluded by the decision of the Supreme Court of Vermont.

We feel confident that neither the Eighth Section of the Act of 1905 or order of production made thereunder are violative of the 14th Amendment, if indeed that amendment could be said to include the guaranty of the 4th Amendment as to illegal searches and seizures. We further maintain that the 14th Amendment is not susceptible of that construction. But we submit, as all sufficient in this case, that no question of illegal search and seizure was before the lower court or is now before this court.

The tenth assignment of error alleges that Section Eight is invalid and that the order of examination thereunder "discriminated between the plaintiff and

defendant in the cause, and between the defendant in such cause when a foreign corporation and the defendant in a similar cause when a domestic corporation or a natural person," and denied to plaintiff in error the equal protection of the laws, in violation of the 14th Amendment.

In so far as this assignment of error proceeds upon the assumption that the defendant in an action by the State, to enforce the Act of 1905, is illegally discriminated against, if the statute requires it to produce books and witnesses on request of the State, and does not, in the same connection, require the State to produce books and witnesses on request from the defendant, it seems to us to be absurd. It rests upon a misconception of the fundamental idea of equal protection of the laws. That phrase as used in the 14th Amendment means this and nothing more: That the State must treat all members of the same class with equality—not that the State shall give to "all persons within its jurisdiction" the same rights which it (the State) possesses and exercises for the ends of government and for the public good.

And, to answer the contention with more seriousness than it deserves, we further call attention to the fact that, in the very nature of cases like the one at bar, and of all anti-trust legislation and prosecutions,

the State is in possession of no facts which bear upon guilt or innocence of the defendant, while necessarily the defendant has peculiar and often exclusive knowledge thereof.

A provision giving the defendant under the Act of 1905 the right to call upon the State to produce "officers, agents, directors and employes" which it did not have, or "books, papers and documents * * * in the possession or under the control" of such nonexistent officer, agent, director or employe, "relating to the merits of the suit or to evidence therein," would have been merest nonsense; and there is certainly no constitutional requirement that such a provision be made.

Indeed, the general statutes of Arkansas give the defendant the right to summon any witness it desires. Under the general statutes, if the plaintiff in error had so desired, it could have summoned every officer or employe of the State of Arkansas and compelled their attendance. It could further have brought into court any book, paper or document which any of these persons had in his possession or under his control, by *subpoena duces tecum*.

Hence, if the right here asserted were of a substantial nature, it is amply protected by the general laws of the State.

In conclusion of our answer to this very remarkable contention, we think it appropriate to suggest that the whole effect of the provisions of Section Eight of the Act of 1905 is to remove a prior inequality in the law. The defendant always had the benefit of all necessary process to procure any evidence the officials of the State could furnish to him, but the State had no practical means of compelling non-resident officers and agents of the corporation to testify or produce documentary evidence.

The statute merely placed the defendant and the State upon a footing of equality in this respect, and made it impossible for a corporation, by keeping its officers and its books out of the State, to defeat the ends of justice.

The remaining question under the tenth assignment of error is presented by the contention that Section Eight and the order of examination are violative of the equal protection clause of the 14th Amendment, in that they "discriminate between the defendant in such a cause, when a foreign corporation, and the defendant in a similar cause when a domestic corporation or a natural person."

We have already pointed out that the terms of the statute apply equally to foreign and domestic

corporations throughout. A domestic corporation is as much the subject of an order of examination under Section Eight as is a foreign corporation. The terms of the statute show this, and no further argument is necessary on that point.

But it is further contended that the section is invalid because it does not apply to natural persons. Again learned counsel is in error. The provisions of Section Eight apply in terms to "any corporation or corporations, individual or individuals, or association of individuals, or joint stock association or co-partnership." The validity of the section, as applied to natural persons, is not before the court in this case; nor, indeed, has it ever been before the courts of Arkansas in any reported case. Learned counsel assume that, as to natural persons, the order of examination could not be made. We do not assent to the correctness of this view; but if it were correct, it would not follow that Section Eight as to corporations would be thereby rendered invalid.

8 *Fed. Stat. Ann.*, 598, *h* 1.

National Cotton Oil Co. vs Texas,
197 *U. S.*, 133.

But a further answer to this contention is the fact that the Act of 1905, even if it be treated as

applicable and valid to corporations alone, is not a discriminatory, but an equalizing statute. It merely takes away from corporations some of the advantages they have always had over natural persons as defendants.

The Supreme Court of Vermont in the case of *In re Consolidated Rendering Co.*, 66 *Atl.*, 790, answer such an objection to the Vermont statute there under consideration, say, at page 799:

"The claim is also made that the statute is contrary to the 14th Amendment of the Constitution of the United States because it arbitiarily discriminates between artificial and natural persons, denying to the former the equal protection of the laws. As before seen, prior to the passage of this Act, an individual could by *subpoena duces tecum* be compelled to do all, by way of producing books, etc., that a corporation can be forced to do under the provisions of the statute.

"*The statute seems designed for requiring the corporation itself, as the responsible owner and legal custodian, to produce the documentary evidence mentioned therein, without the necessity of calling upon bookkeepers, managers and other servants, who may or may not, in fact, have custody or control thereof at the time the notice to produce is given, and to place upon the corporation the responsibility of seeing that such evidence called for, if in its control, is produced.*

"*This accomplishes, in a direct way, the same object which might require much delay and difficulty to accomplish, without the statute, by a subpoena duces tecum served upon such individuals as might be supposed to have the evidence in their custody.*

"The statute leaves the corporation to select such officer, agent or employe as it may see fit, to produce the evidence in compliance with the order made. It authorizes the laying of no unjust burdens upon corporations, as distinguished from individuals, and is designed only to compel the production of admissible testimony to be used in court.

"*The classification made by the statute placed all corporations, whether domestic or foreign, in one class, leaving individuals, whether acting severally, as copartners or associates, in another class. The general differences existing between natural and artificial persons in this respect, without this statute, makes this classification, made a proper one, one that removes the prior discrimination between them, and therefore not in violation of the equality clause of the 14th Amendment.*"

And in the decision of that case by this court, Mr. Justice Peckham, referring to that objection, says:

"Lastly, the objection is urged that there is an arbitrary classification in the statutes, which is confined to corporations alone, and the company is thereby deprived of the equal protection of the laws secured by the 14th Amendment. There is no improper classification in this regard. It is stated by the State court that prior to the passage of this Act there was no adequate provision for compelling the production of books and papers by a corporation, and it was held that the statute was designed for requiring the corporation itself, as the responsible owner and custodian, to produce the documentary evidence mentioned therein, without the necessity of calling upon bookkeepers, managers or other servants who may or may not, in fact, have custody or control thereof at the time notice

to produce is given, and to place upon the corporation the responsibility of seeing that such evidence called for, if in its control, is produced. There is ample justification for the classification made by the statute."

We think that this disposes of all the assignments of error directed to Section Eight of the Act.

IV.

THE VALIDITY OF SECTION NINE OF THE ACT OF 1905.

The fifth, sixth, eleventh, twelfth, fifteenth, sixteenth, seventeenth and eighteenth assignments of error are directed to the validity of Section Nine of the Act of 1905—the section authorizing the rendition of a judgment for refusal to comply with the order of examination.

The fifth assignment of error alleges that the Ninth Section and the judgment rendered thereunder are repugnant to the due process clause of the 14th Amendment.

The sixth assignment alleges that said section and judgment are repugnant to the equal protection clause of the 14th Amendment, because said section did not authorize a like judgment against natural persons as well as corporations; and that the court erred in

holding said section applicable to corporations, "even though said Section Nine did not authorize the redition of a judgment against natural persons under a similar state of case."

The eleventh assignment, except for some slight difference in verbiage, is identical with the fifth; alleging that the action of the court, pursuant to Section Nine, in striking the demurrer and answer from the files and rendering judgment by default, was violative of the due process clause of the 14th Amendment.

The twelfth assignment alleges that the action of the court, under Section Nine of the Act of 1905, in striking the pleadings of the plaintiff in error and rendering judgment against it by default, denied to it the equal protection of the laws guaranteed by the 14th Amendment, because "the Act did not provide for the rendition of such a judgment against the plaintiff and in favor of the defendant under similar circumstances, or for the rendition of a judgment against a natural person, when defendant in the like state of case."

The fifteenth assignment of error is substantially a reiteration of the allegation in the fifth and eleventh —that Section Nine is repugnant to the due process clause of the 14th Amendment. There is, however, added an allegation that the persons named in the

order were not under the control of the plaintiff in error or under any duty to appear as witnesses upon its request.

The sixteenth assignment merely alleges, without statement of any particular ground, that the action of the court under Section Nine is violative of the equal protection clause of the 14th Amendment.

The seventeenth assignment is practically the same as the fifth; asserting, though without specification of grounds, that the action of the court under Section Nine is violative of the due process clause of the 14th Amendment.

The eighteenth alleges, without any statement of grounds, that the action of the court under Section Nine is violative of the equal protection phrase of the 14th Amendment.

From this analysis of the assignments, it is apparent that the validity of Section Nine and the power of the court to render default judgment thereunder, are attacked as violative of two clauses of the 14th Amendment—that guaranteeing due process of law and that guaranteeing the equal protection of the law. With reference to their purport the assignments may be grouped as follows:

1st. The fifth, eleventh, fifteenth and seventeenth, asserting repugnancy to the due process phrase. And,

2d. The sixth, twelfth, sixteenth and eighteenth, asserting the same as to the equal protection phrase.

Discussing these classifications in order, we will first note the question of due process.

1st. *Due process of law.*

By far the most important question in this case is that of due process.

In this group of assignments of error, the plaintiff in error contends that Section Nine of the Act of 1905 is unconstitutional, and that the default judgment rendered in pursuance thereto amounts to a taking of its property without due process of law, in violation of the 14th Amendment to the Constitution of the United States.

We maintain, on the other hand, that the procedure prescribed in said section of the Act of 1905 meets all the requirements of "due process of law," and that, under the facts as reflected by the record here, appellant has not been deprived of its property without due process of law.

Further, we maintain that the provisions of the Act of 1905, requiring corporations to produce evi-

dence and subjecting them to default judgment in the event of their refusal so to do, are conditions which the State, in the exercise of its power to regulate foreign corporations doing business in the State, had the right to impose; and that, as such a statute of regulation, the Act of 1905 is valid. We have, however, discussed this proposition under the first heading in this brief, and we now address our argument to the question of due process as above outlined.

We propose first to briefly outline the principles by which the phrase "due process of law" as used in the 14th Amendment is to be interpreted, and summarize its elements.

The meaning and requisites of "due process of law."

This phrase occurs twice in the Federal Constitution; first in the 5th Amendment, and second in the 14th Amendment. As used in the 5th Amendment it is a limitation upon the Federal Government; and, in the 14th Amendment, upon the States.

This court has repeatedly said that the phrase is not susceptible of any exact definition which will fit all cases; and the Constitution contains no description of those processes which it is intended to allow or

forbid, or what principles are to be applied to ascertain what is due process.

Murray vs. Hoboken Land & Imp. Co., 18 *How.*, 272.

Davidson vs. New Orleans, 97 *U. S.*, 108.

Hagar vs. Reclamation Dist., 111 *U. S.*, 701.

This situation is summarized in the following apt language by Mr. Justice Miller, in *Davidson vs. New Orleans*, 97 *U. S.*, 108:

"It must be confessed, however, that the constitutional meaning or value of the phrase, 'due process of the law,' remains today without that satisfactory precision of definition which judicial decisions have given to nearly all other guaranties of personal rights found in the Constitutions of the several States and of the United States. * * *

"But, apart from the imminent risk of a failure to give any definition which would be at once perspicious, comprehensive and satisfactory, *there is wisdom, we think, in ascertaining the intent and application of such an important phrase of the Federal Constitution, by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning upon which such decisions may be founded.*"

Numerous cases are to be found, in both State and Federal courts, attempting in some degree to define the term, "due process of law." Each decision, however, is more or less confined to its own particular state

of facts; and the attempted definitions are either so general that they are as vague as the term they assume to define, or so limited to the case under consideration that they are of little general value.

One of the best general statements of the idea is the following quotation from Mr. Justice Field, in *Hagar vs. Reclamation District,* 111 *U. S.,* 701:

"By due process is meant one which, following the forms of law, is appropriate to the case and just to the parties affected. * * * The clause in question means, therefore, that there can be no proceedings against life, liberty or property which may result in the deprivation of either, without the observance of those general rules, established in our system of jurisprudence for the security of private rights."

Another clear, though general, statement of the idea is made by Mr. Justice Johnson, in *Bank of Columbia vs. Okely,* 4 *Wheat.,* 244, in the course of a consideration of the meaning of the phrase, "the law of the land," as used in Magna Charta, of which phrase the term, "due process of law," is the equivalent in the Federal Constitution. He says:

"As to these words of the Magna Charta, * * * after volumes spoken and written with a view to their exposition, the good sense of mankind has at last settled down to this—that they were intended to secure the individual from the arbitrary exerise of the powers of government, unrestrained by established principles of private rights and distributive justice."

See also:

Pennoyer vs. Neff, 95 *U. S.*, 714.
Kennard vs. La., 92 *U. S.*, 480.

And in 1898, Mr. Justice McKenna, in *Orient Ins. Co. vs. Daggs*, 172 *U. S.*, 557, 563, summarizes the progress up to that time made in defining the phrase as follows:

"What it is for a State to deprive a person of life, liberty or property without due process of law, is not much nearer to a precise definition today than it was said to be by Mr. Justice Miller in *Davidson vs. New Orleans.*

"The process 'of judicial inclusion and exclusion' has proceeded, and yet this court, in *Holden vs. Hardy*, 109 *U. S.*, 366, again declined specific definition."

In *Pennoyer vs. Neff*, 95 *U. S.*, 714 (1877), Mr. Justice Field, in discussing the phrase says:

"Whatever difficulty may be experienced in giving those terms a definition which will embrace every permissible execution of power affecting private rights and exclude such as is forbidden, there can be no doubt as to their meaning when applied to judicial proceedings. *They mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject matter of the suit;* and, if that involves merely a determination of the personal liability of the defendant, he

must be brought within its jurisdiction by service of process within the State or by his voluntary appearance."

And, in the same case, Mr. Justice Hunt, in his dissenting opinion, quotes with approval the following from *Happy vs. Mosher*, 48 *N. Y.*, 313:

"An approved definition of due proces of law is 'law in its regular administration through the courts of justice.' (2 *Kent's Com.*, 13.) *It need not be a legal proceeding according to the course of the common law,* neither must there be formal notice to the party whose property is in question. *It is sufficient if a kind of notice is provided by which it is reasonably probable that the party proceeded against will be apprised of what is going on against him,* and an opportunity afforded him to defend."

In *Kennard vs. Louisiana*, 92 *U. S.*, 280, a statute of Louisiana was held valid under the "due process" clause of the 14th Amendment, the conclusion of the court being thus summed up by Waite, C. J.:

"It appears that ample *provision has been made for the trial of the contestation before a court of competent jurisdiction; for bringing the party against whom the proceeding is had before the court and notifying him of the case he is required to meet; for giving him an opportunity to be heard in his defense; for the deliberation and judgment of the court; for an appeal, etc.* * * * A mere statement of these facts carries with it a complete answer to all the constitutional objections urged against the validity of the Act."

And in *Walker vs. Sauvinet*, 92 *U. S.*, 90, a case where the same phrase of the 14th Amendment was urged as against a statute alleged to have the effect of abolishing the right of trial by jury in certain cases, the court say:

"This requirement of the Constitution is met if the trial is had according to the settled course of judicial proceedings."

In *Simon vs. Craft*, 182 *U. S.*, 436, Mr. Justice White says:

"The essential elements of due process of law are notice and opportunity to defend."

See also:

Holden vs. Hardy, 169 *U. S.*, 366, 389.

Similar general statements of the rule could be multiplied indefinitely. But we think these are sufficient; and, as the net result of the authorities, we deduce the following propositions:

1. That the essentials of due process of law, in general, are first *notice* and second *opportunity to be heard;* and

2. That, as applied to judicial proceedings, due process of law signifies, in addition to notice and opportunity to be heard—

(a) A course of judicial proceedings according to the established law of the jurisdiction; and

(b) A tribunal competent under the organic law of the State to pass upon the subject matter.

But it will be observed that all the authorities deal in mere generalities, in that they do not go further than the mere statement that there must be "notice" and "opportunity to defend." They do not declare what character of "notice" is required, or in what "opportunity to defend" consists; and therefore, in each case, "the gradual process of judicial inclusion and exclusion" must operate.

As is said by Mr. Justice Curtis in *Murray vs. Hoboken Land and Imp. Co.*, 18 *How.* 272, 276:

"The Constitution contains no description of those processes which it is intended to allow or forbid. It does not even declare what principles are to be applied, to ascertain whether it be due process."

To what principles are we then to turn in attempting to define this definition? By what standard are we to determine whether the "notice" and "opportunity to be heard" are sufficient or insufficient? The rule for determining this proposition in cases arising under the 5th Amendment, where the powers of Congress and the Federal Government are con-

cerned, is thus stated by Mr. Justice Curtis, in *Murray vs. Hoboken Land and Imp. Co., supra,* at pp. 276-7:

"It is manifest that it was not left to the legislative power to enact any process which might be desired. The article is a restraint upon the legislative, as well as the executive and judicial, powers of the government, and it can not be so construed as to leave Congress free to make any process 'due process of law' by its mere will.

"To what principles are we, therefore, to resort, to ascertain whether the process enacted by Congress is due process? To this the answer is twofold. We must examine the Constitution itself, to see whether the provisions be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to be unsuited to their civil and political condition by having been acted upon after the settlement of this country."

But, in cases where the power of a State Legislature is drawn into question under the 14th Amendment, a considerably different standard must often govern; and, as we shall presently show, the States may make wide departures from the common law rules which are the measure of the due process of law guaranteed by the 5th Amendment.

In *Holden vs. Hardy,* 169 *U. S.,* 366, Mr. Justice Brown says, at page 382:

"Prior to the adoption of the 14th Amendment, there was a similar provision against the deprivation

of life, liberty or property without due process of law incorporated in the 5th Amendment; *but, as the first eight Amendments were obligatory upon Congress only, the decisions of this court, under this Amendment, have but a partial application to the 14th Amendment, which operates only on the action of the several States.*"

This distinction between what may be "due process of law" under the 5th and 14th Amendments, is made clearer when we consider the nature of the powers of the Federal Government as compared with those of State Governments.

The Federal Constitution is the source of all authority possessed by the Federal Government. It takes out of the jurisdiction of the States certain matters which are deemed to pertain to the Nation rather than to the States; but all of the vast residuum of powers is left, undisturbed, to the States. This was true on principle; but it is made still more clear by the 10th Amendment to the Constitution, which provides that:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people."

As was said by Mr. Chief Justice Waite, in *Munn vs. Illinois*, 94 *U. S.*, 113:

"When the people of the United Colonies separated from Great Britain, they changed the form, but not the substance, of their government. They retained, for the purpose of government, all the powers of the British Parliament, and through their State Constitutions or other forms of social compact, undertook to give practical effect to such as they deemed necessary for the common good and the security of life and property.

"All the powers which they retained, they committed to their respective States, unless in express terms or by implication reserved to themselves. Subsequently, when it was found necessary to establish a national government for national purposes, a part of the powers of the States and the people of the States was granted to the United States and the people of the United States. This grant operated as a further limitation upon the powers of the States, *so that now the government of the States possesses all the powers of the Parliament of England, except such as have been delegated to the United States or reserved by the people.* The reservations by the people are shown in the prohibitions of the Constitutions."

See also:

Collector vs. Day, 11 *Wall.*, 124.

Ex Parte Merryman, Taney, 246; 17 *F. Cas. No.* 9487.

U. S. vs. Williams, 194 *U. S.*, 295; *concurring opinion, Brewer, J.*

It is therefore apparent that, while it is perhaps true, as said in *Murray vs. Hoboken Land & Imp. Co., supra*, that due process of law under the 5th Amend-

ment must be measured by the common law, the same is not necessarily true when it is sought to test the validity of State legislation by the phrase as used in the 14th Amendment.

Congress has such powers and is subject to such restrictions as are provided by the Constitution, amongst which, as the learned Justice says, there is nothing defining the *kind of procedure* to be adopted in Federal or Congressional courts. It may therefore be said, with propriety, that the Federal Government adopted the common law ideas of the law of the land, and that the 5th Amendment had reference to these in the language, "due process of law."

But does it necessarily follow that the States have no greater power in this respect? We think not. We maintain that the States, at the time of the adoption of the Constitution of the United States, had the fullest measure of the powers to make and administer laws and legal remedies. The Federal Constitution subtracts and withdraws from them certain subjects, conceived to be of national concern. As to these, Congress and the Federal Government assumed control. Congress possesses such powers, only, as are given by the Federal Constitution; and if the power to disregard the common law is not among them, it does not follow that the States are thus hampered.

We maintain that, to that extent at least, the same rule does not apply, and that the due process of law referred to in the 5th Amendment may be very different from that guaranteed by the 14th, because the State possesses certain supreme and inherent powers of legislation, on questions as to which Congress has no authority, and relating to the forms of procedure and to its internal administrative law, which may properly be exercised in such manner as to, in reality, supplant the common law procedure to which Congress is bound down in the 5th Amendment.

These powers, in turn, have limitations and can not extend to the denial of the fundamental rights of a party to be heard or have some sort of opportunity for defending a claim against him; but they are almost unlimited, within these bounds, and may prescribe new, summary and even capricious forms and procedures by which a party must assert or defend his rights, so long as they do, in fact, give him the right to do so.

The Common Law of England and its rules and ideas of procedure furnish the great example which was, in fact, followed by most of the States in erecting their courts and prescribing their rules of procedure. All of them have constitutions, which distribute the powers of government and confer jurisdiction upon

their courts. Most of them have codes, adopting and modifying, in varying degrees, the common law ideas of procedure. But this is, after all, a matter optional with each State; and the State of Louisiana has, in the exercise of its right of choice, used the civil law as the basis for its Code of Procedure.

That there does exist a difference between the due process guaranteed by these two amendments has been recognized several times by this court, although expressions are to be found in several other cases, where the point was not so directly called to the attention of the court, to the effect that the phrases are used in the same sense.

In *Ex Parte Kemmler*, 132 *U. S.*, 436, Mr. Chief Justice Fuller says, at page 448:

"As due process of law in the 5th Amendment referred to that law of the land *which derives its authority from the legislative powers conferred on Congress by the Constitution of the United States, exercised within the limits therein prescribed and interpreted according to the principles of common law*, so, in the 14th Amendment, the same words refer to that law of the land in each State, *which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty which lie at the base of all our civil and political institutions.*"

And, in *French vs. Barber Asphalt Company*, 181 *U. S.*, 324, Mr. Justice Shiras, while admitting that

in many particulars and for the purpose of many cases it might be assumed that the due process phrases in the two amendments mean the same, recognizes that there still exists a fundamental difference between the scope and purposes of the two expressions, which may in other cases render it necessary to distinguish between them. At page 328 he says:

"It may prevent confusion and relieve from repetition if we point out that some of our cases arose under the provisions of the 5th and others under those of the 14th Amendments to the Constitution of the United States. *While the language of those amendments is the same, yet, as they were engrafted on the Constitution at different times and in wholly different circumstances of our national life, it may be that questions will arise in which different constructions and applications of their provisions may be proper.*"

See also:

Holden vs. Hardy, 169 *U. S.*, 366.

This distinction is important in this case for two reasons: (1) Because, as we shall presently note, the cases relied upon by appellant are constructions of the due process phrase of the 5th Amendment; and (2) because it is the principle upon which is based the rule that:

The States shall have the right to control the practice and procedure in their own courts, and that the 14th Amendment does not deprive them of such power.

This proposition has often been recognized and declared by this court.

In *Holden vs. Hardy,* 169 *U. S.,* 366, Mr. Justice Brown said:

"The Constitution of the United States, which is, to a large extent, inflexible and exceedingly difficult of amendment, should not be so construed as to deprive the States of the power to so amend their laws as to make them conform to the wishes of the citizens, as they may deem best for the public welfare, without bringing them into conflict with the supreme law of the land."

In *Bank of Columbia vs. Okely,* 4 *Wheat.,* 235, Mr. Justice Johnson says, at page 245:

"The forms of administering justice, and the duties and powers of courts as incident to the exercise of a branch of sovereign power, must ever be subject to legislative will, and the power over them is inalienable, so as to bind subsequent legislatures."

In *Brown vs. New Jersey,* 175 *U. S.,* 178, Mr. Justice Brewer, in discussing the application of the 14th Amendment to a statute of New Jersey which provided for a struck jury in a felony case, says, at page 175:

"The State has full control over the procedure in its own courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution."

In *Iowa vs. Iowa Cent. Ry. Co.*, 160 *U. S.*, 389, Mr. Justice White says, at page 393:

"It is clear that the 14th Amendment in no way undertakes to control the power of a State to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for these purposes gives reasonable notice and affords fair opportunity to be heard before the issues are decided. This being the case, it was obviously not a right, privilege or immunity of a citizen of the United States to have a controversy in a State court prosecuted or determined by one form of action or another. It is also equally evident, provided the form sanctioned by the State law gives notice and affords an opportunity to be heard, that the mere question of whether it was by motion or ordinary action in no way rendered the proceeding not a due process of law within the constitutional meaning of these words."

In *L. & N. Ry. Co. vs. Schmidt*, 177 *U. S.*, 230, Mr. Justice White, at page 236, says:

"It is no longer open to contention that the due process clause of the 14th Amendment to the Constitution of the United States does not control mere forms of procedure in the State courts or regulate practice therein. All its requirements are complied with, in the proceedings which are claimed not to have been due process of law, provided the person condemned has had sufficient notice and an adequate opportunity afforded him to defend."

Closely allied to the proposition last stated is the one that:

In the exercise of their right to control the procedure and practice of their own courts, the States may abolish and abrogate the common law practice and provide new or summary mode of trial, subject only to the limitation that there must always be some sort of notice and opportunity to be heard.

In *Brown vs. New Jersey*, 175 *U. S.*, 172, Mr. Justice Brewer says, at page 175:

"The 14th Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States, separated only by an imaginary line. On one side of the line there may be a right of trial by jury, and on the other side no such right. Each State prescribes its modes of judicial proceedings. * * *

"*The State is not tied down by any provision of the Federal Constitution to the practice and procedure which existed at the common law. Subject to the limitations heretofore named, it may avail itself of the wisdom gathered by the experience of the centuries, to make such changes as may be necessary.* For instance, while at common law an indictment by the grand jury was an essential preliminary to trial for felony, it is within the power of the State to abolish the grand jury entirely and proceed by information."

In *Simon vs. Craft*, 182 *U. S.*, 436, at page 437 the court says:

"*But the due process clause of the 14th Amendment does not necessitate that the proceedings in a State court should be by any particular mode, but only*

that there shall be a regular course of proceedings, in which notice is given of the claim asserted and an opportunity afforded to defend against it. * * * If the essential requisites of full notice and opportunity to defend were present, this court will accept the interpretation given by the State court as to the regularity, under the State statute, of the practice pursued in the particular case."

In *Kansas City vs. Duncan*, 37 *S. W.*, 513, the Supreme Court of Missouri, speaking through Robinson, J., says, at page 515:

" 'Due process of law' does not mean a judicial proceeding, according to the course of the common law. Neither does it mean that there must be personal notice to the party or parties whose property is to be affected, as contended by the appellants. 'Due process of law,' as applied to judicial proceedings, means law in its regular course of administration through the established courts of the State; and to the legislature belongs the exclusive authority and power to prescribe the modes, means and conditions on which proceedings affecting parties and property are to be commenced and carried on within its territory. While the legislature would be powerless to authorize our courts to enforce judgments, where notice of no character was given, to it alone, and to no other body, does the right of saying what shall be the mode and manner of the notice to be given belong; and, if it is such as was provided in the section in question, that was reasonably probable to reach the appellants, the judgment based on such proceedings will be sustained."

See also:

Holden vs. Hardy, 169 *U. S.*, 366, 382.

Iowa vs. Iowa Cent. Ry., 160 *U. S.*, 389.

Missouri vs. Lewis, 101 *U. S.*, 31.
Ex Parte Reggel, 114 *U. S.*, 642, 651.
Walker vs. Sauvet, 92 *U. S.*, 90.

In the cases already cited various substantial departures from the common law are recognized as being, none the less, due process of law; and the proposition is further borne out by the following quotations from 9 *Fed. St. Ann.* At page 291 it is said:

"The words 'due process of law' do not necessarily imply a regular proceeding in a court of justice, or after the manner of such courts."

And further that:

"Due process of law does not require a plenary suit and a trial by a jury in all cases where property or personal rights are involved."

And at page 292, that:

"Due process of law does not necessarily imply a trial by jury, or even a trial according to common law forms and proceeding according to common law methods. That is due process of law which is according to the method of legal proceedings adopted in similar cases."

And this power of the State to control the procedure in its courts extends and embraces the right to control forms of pleading, the production of evidence and the rendition of judgments by default.

In 8 *Cyc.* it is said, at page 823:

"In the exercise of this power to prescribe rules of procedure and administrative laws in general, the States have the right to prescribe the rules governing the formalities and essentials of pleadings, the production of evidence, and the *rendition of judgments by default*, in their courts."

As to the essentials of that notice and opportunity to be heard, which must not be denied, there is no definite criterion, if a State statute authorizes a certain course of proceeding in the courts of that State, and the law is valid under the State Constitution.

In *Allen vs. Georgia*, 166 *U. S.*, 138, the plaintiff in error claimed that an order, made by the Supreme Court of Georgia, dismissing his writ of error, sued out from a conviction of murder, because he had escaped from jail and was a fugitive from justice, was a denial of the due process of law guaranteed by the Federal Constitution. The court held that there was no such denial of due process, saying, through Mr. Justice Brown:

"To justify any interference upon our part, it is necessary to show that the course pursued has deprived, or will deprive, the plaintiff in error of his life, liberty or property without due process of law. Without attempting to define exactly in what due process of law consists, it is sufficient to say that, if *the Supreme Court of a State has acted in consonance with the constitutional law of the State, in its own procedure, it could only be in very exceptional circumstances that*

this court would feel justified in saying that there had been a failure of due legal process. We might ourselves have pursued a different course, but that is not the test. The plaintiff in error must have been deprived of one of those fundamental rights, the observance of which is indispensable to the liberty of the citizen, to justify our interference."

In *Wilson vs. State of North Carolina*, 169 *U. S.*, 586, it was contended that a statute, creating an office and providing for the suspension or removal of the incumbent by the governor in a certain manner, even though no means was provided by which the accused might face his accusers, and he was in fact denied the opportunity so to do, did not work a denial of due process. Going further, the court held that the creation of offices and the filling of same being a matter as to which the State legislature was limited only by the Constitution of the State; and the Supreme Court of the State having held the law valid as tested by the State Constitution, no Federal question was presented.

Mr. Justice Peckham, delivering the opinion of the court, says, at page 593:

"The procedure was in accordance with the Constitution and laws of the State. It was taken under a valid statute, creating a State officer in a constitutional manner, as the State court has held. *What kind and how much of a hearing the officer should have before the suspension by the governor was a matter for the State legislature to determine, having regard for the*

Constitution of the State. The procedure provided by a valid State law, for the purpose of changing the incumbent in a State office, will not, in general, involve any question for the review of this court. A law of that kind does but provide for the carrying out and enforcement of a policy of the State with reference to its political and internal administration, and a decision of the State court, in regard to its construction and validity, will generally be conclusive here. The facts would have to be most rare and exceptional which would give rise in a case of this nature to a Federal question."

Sections Eight and Nine of the Act of 1905 were passed by the Legislature of Arkansas, in the exercise of this inherent power of the State to establish and change rules of procedure, practice and evidence. Section Eight is directed particularly to the production of evidence. It provides that, whenever, in any suit by the Attorney General or a Prosecuting Attorney, under the Act, against any corporation, the Attorney General or Prosecuting Attorney desires to take the testimony of any officer, director, agent or employe of such corporation, and such witnesses reside without the State, he shall file in court or before the judge a statement in writing, setting forth their name together with the time when and the place where he desires them to appear for examination; that thereupon the court shall make an order for their examination, and for the production of books, papers and

documents under the control of such persons and relative to the issue in the case, and appoint a commissioner to take such evidence; that the commissioner shall thereupon issue a notice in writing to the corporation that the testimony of the persons named in the application is desired, and requesting it to have them at the time and place mentioned in the application to testify. Further provisions relate to the time to be allowed for the production of such witnesses.

Section Nine, the one which is challenged as depriving appellant of its property without due process of law, relates more particularly to the procedure and practice in cases when the corporation refuses to comply with the order made under Section Eight. It provides that:

"Whenever the persons mentioned in the preceding sections shall be notified, as above provided, to request any officer, agent, director or employe to attend before any court or before any person authorized to take the testimony in said proceedings, and the person or persons whose testimony is requested, as above provided, shall fail to appear and testify and produce any books, papers and documents, they may be ordered to produce by the court, or the other officer authorized to take such evidence, then it will be the duty of the court, *upon motion of the Attorney General or Prosecuting Attorney, to strike out the answer, motion, reply, demurrer or other pleading then or thereafter filed in said action or proceeding by said corporation,* joint stock association or co-

partnership, whose officer, agent, director or employe has neglected or failed to attend and testify and produce all books, papers and documents he or they shall have been ordered to produce in said action by the court or person authorized to take said testimony, *and said court shall proceed to render judgment by default against said corporation,* joint stock association or copartnership. *And it is further provided,* that in case any officer, agent employe, director or representative of any corporation, joint stock association or copartnership in such proceeding, as hereinbefore mentioned, who shall reside or be found within this State, shall be subpoenaed to appear and testify or to produce books, papers and documents, and shall fail, neglect or refuse to do so, then the answer, motion, demurrer or other pleading then and thereafter filed by said corporation, joint stock association or copartnership in any such proceeding shall, on motion of the Attorney General or Prosecuting Attorney, be stricken out and judgment in said cause rendered against said corporation, joint stock association or copartnership."

The facts, as reflected by the record here, are as follows:

That the Attorney General filed suit against the appellant, a foreign corporation doing business in Arkansas, for violation of the anti-trust Act of 1905.

That thereafter the Attorney General filed a motion (Record, 9-11) in writing, under Section Eight of said Act, setting forth that sixteen persons therein named were officers, agents, directors and employes of the defendant company, and non-residents of the

State of Arkansas. The motion prayed the appointment of a commissioner to take the evidence of the persons named, at a designated office in Chicago, on September 20, 1906, or on the date or dates thereafter to which the taking thereof might be adjourned.

The defendant—appellant here—filed a motion to require the motion for an order of examination to be made more specific (Record, 11 and 12), and also a motion that the depositions be taken on written interrogatories, both of which motions were by the court overruled. (Record, 12 and 13.) Thereupon the court made an order granting the prayer of the motion of the Attorney General, appointing Lyle D. Taylor of Chicago as commissioner to take the testimony of the parties named in the motion at the office of said commissioner in Chicago, on the 20th day of September, 1906, and giving said commissioner directions as to the issuance of notice, the conduct of the examination and the return of the depositions. (Record, 13 and 14.) A commission was thereupon duly issued and sent to said Lyle D. Taylor, in pursuance to said order of examination. (See Record, 43-46.)

The record of the proceedings had before the commissioner (Record, 46-51) shows the following:

That he received his commission on September 12, 1906, and that on the same day he issued notices to the defendant and served or caused same to be served upon the president and its attorney of record. (Record, 47.) The notice apprises the defendant of the granting of the commission and its purposes, giving the names of the persons to be examined, notifies it that their testimony is desired, and requests it to have them present before the commissioner for examination on September 20, 1906, at 10 a. m. (Record, 48-50.)

That after several postponements had by consent, from day to day, upon October 2, 1906, in open session of the commission, both parties being present by attorneys, the commissioner, at the request of the plaintiff, called for the production of J. Ogden Armour, one of the sixteen persons named in the commission and order of examination, and that said witness failed to appear and testify (Record, 47-48), but that the appellant addressed to and filed with the commissioner a letter in which it refused to comply with the request of the commissioner to produce any of its officers or employes for examination. (Record, 50-51.)

Upon the return of the record of the commissioner the Attorney General, on October 8, 1906, in pursuance to Section Nine of the Act of 1905, filed a motion in the

circuit court setting forth the facts as above stated and the refusal of the defendant company to produce the persons named in the commission for examination before the commissioner, and praying that the answers, demurrers, returns, replies and other pleadings of the defendant be stricken out and judgment rendered against said defendant by default. (Record, 29-31.)

This motion for a default judgment was served on defendant's attorneys on October 8, 1906. (Record, 31.) On October 25, 1906, the defendant filed a response to said motion for a default judgment, contesting same upon ten different grounds. (Record, 32-34.)

On October 27, 1906, the parties appeared by attorneys, and after argument heard, the court granted the motion for a default judgment. (Record, 36.)

Upon this state of facts the plaintiff in error contends that it was denied the notice and opportunity to be heard, which are essential to due process of law. We maintain that it had both. That in point of fact, it had notice of the whole proceeding is not seriously denied. But it is urged that there was no opportunity to defend given, because its pleadings were stricken out.

In point of fact, plaintiff in error was served with a copy of the motion for a default judgment, and after a reasonable time filed a response to the same, and was in fact heard by the court in opposition to the motion. It is difficult to conceive how it could have been given a greater opportunity to be heard.

So far as concerns the procedure adopted in this case, it was not only in conformity to the Act of 1905, but it gave to the appellant the fullest opportunity to be heard and show cause against the granting of the motion for a default judgment.

That such a procedure does not deny the due proces of law is settled by the recent decision of this court in *Consolidated Rendering Co. vs. Vermont, Mss. Op.* In that case a corporation disobeyed an order to produce certain books and documents before a grand jury, as required by statute. Thereupon the Attorney General filed a petition in the county court, setting forth the order of production and the fact that the corporation had, in many important particulars, refused to comply with it, and asking that the company be proceeded against for contempt. The county court thereupon issued a rule upon the company to show cause why it be not so punished. The company appeared by counsel upon the return day, and moved

to dismiss the proceeding, alleging various reasons for which, as it contended, it should not be required to produce the books and papers which it had refused to produce. An answer was also filed, alleging that the books and papers in question had been destroyed and were not in the possession of the company. The State took issue upon these averments of the answer. A hearing was had and the company introduced oral evidence upon the averments of the answer. The court found the facts against the company and adjudged it guilty of contempt. It was contended that this judgment was without due process of law. Mr. Justice Peckham, in discussing this contention, says:

"Counsel insisted before us, in discussing the second objection, that the failure to give an opportunity to be heard why the books should not be produced deprived it of the due process of law guaranteed under the 14th Amendment. Without discussing the question whether this matter comes within the meaning of due proces of law, we may say that the objection to the statute is not borne out by its text. The company had, under its provisions, and by the 4th section, a full opportunity to show cause before the court why it did not produce the papers; and the Supreme Court of Vermont has held in this case that any objection to the production of the papers, made before the grand jury, would have raised the question before that body, which it would have been its duty to report to the court for its action. Upon such question the company would have been entitled to be heard, and it was, in fact, heard before the court previous to any decision by the court with regard to the right of the company

to withhold the papers. *So long as a hearing is given before any proceeding is concluded to enforce the production of the papers, due process of law is afforded. Simon vs. Craft*, 182 *U. S.*, 427; *Wilson vs. Standefer*, 184 *U. S.*, 399-415; *N. O. Waterworks Co. vs. La.*, 185 *U. S.*, 336-349."

The facts in the case at bar, as disclosed by the record, bring it closely in line with this case. There the refusal to produce papers was made before the grand jury and by it certified to the court; here the refusal to produce witnesses and papers was before a commissioner, and the refusal, together with the reasons assigned therefor in the letter (Record, 50) was certified to the Pulaski Circuit Court. In neither case did the company present before the officer or tribunal which demanded the evidence any reason for its refusal. In the Vermont case the Attorney General filed a petition in court, setting forth the proceedings and the company's refusal, and praying that it be punished for contempt; and at the case at bar the Attorney General presented to the court the record of the proceedings had before the commissioner, embracing the refusal of the company, and filed a petition setting forth those facts, and praying that the answer, etc., of the company be stricken and default judgment rendered against it, under Section Nine of the Act of 1905. In the Vermont case a rule to show cause

was issued; while in the case at bar a copy of the petition of the Attorney General was delivered to counsel for the company on the day it was filed. (See Record, 31.) In the Vermont case the company appeared by counsel and filed a motion to dismiss and an answer; and in the case at bar the company likewise appeared by counsel and filed an answer or response, not, however, raising any issue of fact or in any way denying that the witnesses and books were not in their possession or under their control, or alleging any reason for their non-production, beyond denying the legal right of the State to demand same. In the Vermont case a hearing was had on the petition and answer, and evidence was introduced by the company to show that the papers demanded were not in its possession; while in the case at bar, though a hearing was had on the motion and response, no evidence was introduced or offered by the company. The parellel between the two cases seems to be exact, in all material respects, except, indeed, that the company in the Vermont case did attempt to make a defense on the merits of the petition, while the company in the case at bar did not. But, in both cases, there was a hearing, where an opportunity was afforded to show any reasons which might exist for the failure to comply with the order; and, under the rule as laid down in the Vermont case, due process of law was afforded.

The practical effect of Sections Eight and Nine of the Act of 1905 is that the State, in the exercise of its right to control the production of evidence, the pleadings and practice and form of procedure in its own courts, has required of a defendant charged with a violation of that Act, that, in order to join issue, it must do more than file the formal and usual answers, demurrers and pleas. It must, in addition, hold itself in readiness, when ordered to do so, to furnish the court with the facts in its possession—it must show a willingness to go further than a mere formal pleading in denial of the complaint—and to have the truth of its denials sifted by submitting the witnesses and evidence under its control.

If, indeed, the denials of the answer were true, the plaintiff in error could not suffer by allowing the evidence in their support to be brought out. Had it done so, the case would have taken the regular course of all civil cases—been submitted to a jury and gone through a trial according to all the forms of law. But the plaintiff in error elected to remain silent, and to refuse to assert and defend its rights, merely because it did not suit it to follow the procedure mapped out by the legislature for the case.

The experience of modern times has demonstrated the need of legislation which will enable the courts to

compel defendants in such cases as this to submit their cases fairly, fully and without concealment. It has become apparent that the ordinary rules of procedure are not sufficient to reach them; and the Legislature of Arkansas has exercised its power to make and alter rules of evidence, procedure and practice, in such a manner as to require defendants under this Act, in order to join issues and prevent a judgment by default, to produce the evidence within their control, as well as to file their formal pleas in court.

The law in question did not deny the plaintiff in error the right to a hearing. It merely prescribed the manner in which such hearing should be had. It took away from the defendant no right, whatever, of asserting any defense it had and making proof thereof; but it gave the court the power to insist upon this being done in a certain, orderly course. The defendant has arbitrarily and contumaciously refused to follow this course, presumably because it conceived that there was danger in frankness and feared full disclosure of the facts. Aside from the presumption afforded by this refusal to submit it to a fair examination into the truth —a presumption which, as we shall presently note, the legislature had the right to say should be conclusive of guilt—the plaintiff in error is before the court now, insisting that it is entitled to defend its

case in some certain manner which it, for reasons of its own, perfers to that prescribed by the State. It says to the court: "I will defend, if you will let me do so in my own way. I want to deny the allegations of the complaint and frame an issue, but I decline to let you know the facts upon which I base my denial."

There seems to us a strong analogy between the attitude of the plaintiff in error in this case and that of the plaintiff in error in the case of *Allen vs. Georgia*, 166 *U. S.*, 138. In that case, Allen, having been convicted of murder and having sued out a writ of error in the Supreme Court of the State, escaped and became a fugitive from justice. When his case was called, the Supreme Court of Georgia dismissed his writ of error, upon this ground. He brought the case, on writ of error, to the Supreme Court of the United States, claiming that the action of the Supreme Court of Georgia, in dismissing his writ of error as aforesaid, was a denial of the due process of law. The Supreme Court held that the procedure was a matter within the control of the State and governed by its constitutional law; but it further held that the dismissal of the writ of error because of the absence and escape of Allen was proper practice.

Mr. Justice Brown, who delivered the opinion, says, at page 141:

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"We can not say that the dismissal of a writ of error is not justified by the abandonment of his case by the plaintiff in the writ. By escaping from legal custody, he has, by the laws of most, if not all, the States, committed a distinct criminal offense, *and it seems but a light punishment for that offence to hold that he has thereby abandoned his right to prosecute a writ of error, sued out to review his conviction. Otherwise he is put in the position of saying to the court, 'Sustain my writ and I will surrender myself and take my chance upon a second trial; deny my writ and I will leave the State or forever remain in hiding.'*

"We consider this as practically a declaration of terms upon which he will surrender, and a contempt of its authority, to which no court is bound to submit. It is much more becoming to its dignity that the court should prescribe the conditions upon which an escaped convict should be permitted to appear and prosecute his writ, than that the latter should dictate the terms upon which he will consent to surrender himself to its custody."

Citing many cases sustaining the power of the court.

As is said by Mr. Justice Brown, the action of the defendant in this case is "practically a declaration of terms upon which it will surrender, and a contempt of its authority, to which no court is bound to submit."

In this case, as in that, "it is much more becoming to its dignity" for the circuit courts, and the courts in general of this State, to "prescribe conditions upon which" a defendant may appear and make

defense "than that the latter should dictate the terms upon which he will consent to surrender himself to its custody."

The plaintiff in error is in the attitude of claiming that it has a vested right to make its defense in the ordinary forms of common law. It seeks to invest the mere formal answer filed by it with some degree of sacredness, and claims that, not only has it the right to make its defense, but that it has the right to refuse to go further than the mere filing of a written denial of the statements in the complaint. This position is directly opposed to the cases hereinbefore quoted, bearing upon the extent of the power of the State to change the rules of the common law. As is said in *Munn vs. Illinois,* the defendant here "has no property, no vested interest, in any rule of the common law," and especially is this true of mere rules of pleading and procedure.

Far from denying the plaintiff in error the opportunity to be heard and to make its defense, the circuit court, at all times, afforded it full opportunity and invitation to set up and sustain by evidence any defense it had. The order of examination itself, of which it so bitterly complains, is but another and an extraordinary opportunity to show its innocence, if in

fact not guilty. The Attorney General and the circuit court invited and urged it to merely let the truth be known. They did more than give it an opportunity to be heard. They tried, by all reasonable means, to bring it to a hearing. But, while contending here for this right, and claiming that it was denied a fair hearing and opportunity to defend, it is perfectly apparent that this is exactly what the defendant did not want. It was perhaps willing to submit the controversy to a formal trial, on condition that it be allowed to cripple the State in the procurement of evidence by keeping its books and its managing agents out of the reach of the process of the court, and so closing the avenues through which the State would necessarily have to seek its proof of the facts charged in the complaint.

Colored by these surrounding facts, then, the proposition which the plaintiff in error urges here is substantially this:

That it has a sacred right to be protected by a court which it, in the same breath, defies; and that it has a vested right to the protection of the courts in its attempt to defeat the law.

Learned counsel for the plaintiff in error seek not "the due process of the law," but the defeat and miscarriage thereof.

This is a case where the due process phrase is invoked in an attempt to defeat the due administration of justice, rather than in an attempt to secure it. The court is asked to stultify itself and the State government by holding that, while the State had the power to prohibit and punish trusts and monopolies, it could not make such changes in the established and usual forms of procedure as might be necessary in order to make its laws in that behalf effectual.

The existence of industrial trusts and monopolies is a condition peculiar to this age. The great expounders of the common law never had to deal with the problem presented to the courts by these combinations. Hence, as might be expected, new rules have become necessary to meet the new conditions. The experience of the State governments, ever since the regulation of trusts and monopolies has become a burning issue and an object of government, has demonstrated the futility of prosecutions in State courts, where the witnesses upon whose testimony the State must rely are employes and officers of the defendant and live in other States, beyond the reach of process. The practice of taking depositions upon interrogatories, while adequate for ordinary cases, as applied to such a case is a mockery and futility. The witnesses, thus apprised of the questions they are ex-

pected to answer, and being given an abundance of time to concoct their answers on advice of counsel, the depositions may as well not be taken.

If this class of offenders can successfully hide themselves behind the due process clause of the 14th Amendment to the extent of restricting the States to the ordinary forms of procedure applicable in ordinary cases, and, by keeping their books and their witnesses outside the State line, defy the power of the State to even inquire into their business, then, in truth, the 14th Amendment is a refuge of immunity for law-breakers, when they may cloister themselves and laugh at the law from the safe vantage point of a home across the State line, rather than a statutory protection to the citizen against oppression of the State.

Neither the 14th Amendment nor any other portion of the Constitution was ever designed to be a means of defeating the due administration of justice; and, like all other great principles, it may be made absurd if carried to such extremes of application.

We submit that, upon the principles deduced from the authorities hereinbefore cited, the State had the right to prescribe the rules of evidence, procedure and practice contained in Sections Eight and Nine of the Act of 1905, and that same Act is not in violation of

the due process clause of the 14th Amendment. We shall presently show that similar powers of legislation have always been exercised by both the State and Federal governments without question as to their being due process of law; but shall first notice the authorities upon which appellant bases its contention.

The principal case which is pressed as an authority for the proposition that a default judgment rendered after striking out a defendant's pleas is without due process of law, is *Hovey vs. Elliott,* 167 *U. S.,* 409.

That is a case wherein the Supreme Court of the District of Columbia, acting independently of and without any grant of power from its constituted or governing authorities—the Constitution and Congress—struck out the answer of a defendant, for contempt, and entered a decree against him, *pro confesso.* This was done upon the assumption that the court had the inherent power to thus punish contempts. This court, in an able opinion by Mr. Justice White, after a careful and exhaustive analysis of the authorities, held that the court had no such inherent power, and that the decree was rendered without due process of law.

There are two important distinctions between that case and the one at bar. The first of these is that in

that case the judgment was rendered against defendant as a punishment for contempt in refusing to comply with an interlocutory order of court as to the payment of moneys, while in the case at bar the default judgment was rendered, not as a punishment for contempt, but pursuant to a fixed statutory rule of procedure, and after notice and hearing.

The second of these distinctions is that in that case the court of the District of Columbia, assuming to have the inherent power to so punish contempts, rendered the decree *pro confesso,* without any authority so to do from either Congress or the Constitution. This latter is perhaps the most important distinction; and in this case it is necessary that we keep in mind the distinction between those cases, on the other hand, where the court, claiming to act upon its inherent power to punish for contempt, strikes out an answer and renders judgment against a defendant, and those, on the other hand, where the action of the court is in pursuance of a statute of the State. In the first class of cases, the judgment must be measured by the power of the court independently of any authorizing statute; in the second, by the power of the State to pass the law authorizing the procedure.

This distinction is clearly and ably pointed out by Mr. Chief Justice Hill, in the opinion rendered in this

cause in the Supreme Court of Arkansas. In discussing the decision of *Hovey vs. Elliott*, 167 *U. S.*, 409, the learned Chief Justice says:

"The decision was expressly rested on 'the want of power in the courts of the District of Columbia to suppress an answer of parties defendant, and, after so doing, to render a decree *pro confesso*, and in case of default for want of an answer.'

"IN THE CASE AT BAR, THE COURT DID NOT LACK THE POWER TO STRIKE OUT THE ANSWER AND PROCEED AS IN CASE OF DEFAULT, IF IT WAS COMPETENT FOR THE STATE TO CONFER THAT POWER UPON THE COURT. HENCE THE QUESTION HERE IS NOT THE POWER OR WANT OF POWER OF THE COURT, BUT THE POWER OR WANT OF POWER OF THE STATE TO ENACT THE STATUTE UNDER REVIEW." (See Record, page 58.)

Furthermore, we call attention to the fact that in *Hovey vs. Elliott* the "due process" discussed was that which, under the 5th Amendment, the Federal Government is forbidden to deny. We have already discussed the possible distinction between the scope of the phrase as used in the 5th and 14th Amendments. The decision in that case proceeds wholly upon the common law power of punishment for contempts; and the court, after demonstrating that there is nothing in the common law to warrant the rendition of a decree *pro confesso* as a punishment for contempt, and no

express warrant by Act of Congress or provision of the Constitution, very properly concludes that the action of the Supreme Court of the District of Columbia was not due process of law.

But if Congress had passed a statute authorizing such a punishment for contempts, a case more nearly, but still not exactly, like the one at bar would have been presented. What would have been the decision upon such a case is in no wise settled by the decision in *Hovey vs. Elliott.* The question then would be, as here, as to the constitutional power of the law making body to pass such an Act, and as to whether or not Congress had the right to disregard and abrogate the common law ideas by passing such a statute.

Whatever be the correct answer to such a proposition as applied to Congress, it is manifest, from the cases heretofore cited, that the States have exclusive powers in such matters.

Hovey vs. Elliott has long been a leading case upon the extent of the *inherent power of a court* to punish for contempt by refusing to hear the contention. But it is not a decision as to the extent of the *reserved power of the State Legislatures* to enact statutes of procedure prescribing rules for the entry of default judgments.

Appellant, in the argument of the case below, further relied upon *McVeigh vs. U. S.*, 11 *Wall.*, 259, 266. Like *Hovey vs. Elliott,* that was not a case wherein the validity of a statute was challenged, as denying of the due process of law. In that case, a libel of information was filed in the United States District Court for the Eastern District of Virginia to confiscate certain real estate of McVeigh. The defendant appeared, interposed a claim to the property and filed an answer. The attorney for the United States thereupon submitted a motion that the appearance, answer and claim of defendant be stricken out upon the ground that he was "a resident of the city of Richmond within the Confederate lines and a rebel." An order was made according to the motion, and the property was condemned as forfeited and ordered sold. This action was not predicated upon any Act of Congress, but the dictrict court seems to have acted wholly upon what it considered its inherent powers. Manifestly, then, the action of the court, being neither sustained by principle or authorized by statute, was not due process of law under the 5th Amendment. Indeed, it is exceedingly doubtful whether Congress would have authorized such a procedure at all. But, be that as it may, it is a far cry from a case where a Federal court acts without the warrant of either com-

mon law or Act of Congress to one where a State, in the exercise of its undoubted inherent powers, prescribes by statute certain rules for the rendition of default judgments. There is no analogy between the cases. There is merely a *prima facie* similarity, in that in each case the pleadings of the defendant are stricken out and judgment rendered against him. But there the similarity ends. The principles by which the question of due process must be measured are wholly different. In the McVeigh case the question was, Did the court have such an inherent power or was it authorized upon general principles? In the case at bar, the question is as to the power of the State to prescribe certain rules of procedure, practice and evidence in its own courts. We submit that *McVeigh vs. U. S.* is not in point here.

The next case upon which appellant relies is *Windsor vs. McVeigh,* 93 *U. S.,* 274. That was another branch of the same controversy as that in *McVeigh vs. U. S., supra,* and it is distinguishable from the case at bar for the same reasons.

And since these Federal cases are constructions of the due process phrase of the 5th Amendment, and not decisions upon the validity of State legislation under the 14th Amendment, as already pointed out,

they are not in point in this case. The procedure which would be due process under the common law ideas of procedure is not a criterion for due process under State legislation.

In addition to these, plaintiff in error, upon the hearing below, cited cases from various States, following *Hovey vs. Elliott,* and holding that there existed no *inherent* power, *independent of statute,* in the courts to *punish contempts* by refusing to hear the contemnor and rendering judgment against him. But in all of them the question was as to the *inherent power of the court* to render such a judgment for such a cause, and not as to the power of the State or government, by appropriate legislation, to authorize some certain procedure.

In *Foley vs. Foley* (*Cal.*), 52 *Pac.*, 122, was a case where the answer of the defendant was stricken out and judgment rendered against him because he was in contempt of court for refusal to pay alimony.

Younger vs. Superior Court (*Cal.*), 69 *Pac.*, 485, was also a case where the court struck a pleading from the files and rendered judgment against a party for contempt of court.

In *McClatchey vs. Superior Court* (*Cal.*), 696, the trial court refused to hear a party because he had

falsely published a report in relation to a cause on trial and was in contempt therefor.

In *State vs. Clancy* (*Mont.*), 61 *Pac.*, 987, the court, following *Hovey vs. Elliott,* held that a defendant, in contempt for disobedience of an injunction, was nevertheless entitled to make his defense.

To the same general effect are also the following cases relied upon by the appellant:

Harley vs. Montana, etc., 71 *Pac.*, 407.
Hebb vs. County Court, 37 *S. E.*, 678.
Greig vs. Ware, 55 *Pac.*, 163.

It is to be noted that in all these cases the trial court struck out a party's pleading, or refused to hear him, merely because he was guilty of some contempt of court. They are contempt cases, pure and simple, and, as said in *I. C. Ry. vs. Sanford, supra*, have no application to the question of the right of the legislature to control forms of procedure and rules of evidence, and to require that a party, in order to make a defense, shall do so in some certain manner which does not, in fact, deny him an opportunity to be heard if he will comply with the law.

We will proceed to call the attention of the court to authority which, in our view, is in point here—the

case of *Illinois Central Ry. Co. vs. Sanford*, 75 *Miss.*, 862.

That was a suit against the railroad company for damages.

The Code of Mississippi provides as follows:

"If the testimony of a party to a suit, who resides out of the State, be desired by the adverse party, interrogatories to him may be filed in the clerk's office, and a copy thereof, with notice of the filing, shall be given to the party, or his atorney or solicitor; and, if he fails to answer such interrogatories within a reasonable time, his suit shall be dismissed, if he be plaintiff or complainant; and, if he be defendant, his plea or answer may be taken off the file and judgment by default entered, or the bill taken as confessed." (*Code* 1892, *Section* 1761.)

After plea by the defendant, the plaintiff filed fourteen interrogatories addressed to the defendant. The defendant moved to strike the interrogatories from the files, for the reason, amongst others, that, as it contended, the section of the code above quoted was unconstitutional. The court overruled this motion, and the defendant refusing to answer the interrogatories, its plea was taken from the files and a judgment entered against it, by default. On appeal the Supreme Court affirmed the judgment. The opinion is short, but to the point; and we invite the court to a careful consideration of it. Teral, J., in delivering

the opinion of the court, has this to say upon the constitutionality of the code provision above set out:

"It was a declaration of the Magna Charta that no one should be deprived of a right without being heard in his defense; and this principle is embodied in Section 14 of our State Constitution, which provides that 'no person shall be deprived of life, liberty or property, except by due process of law.'"

Continuing then, and applying the phrase to the procedure authorized by the code, the court say:

"*However wholesome this doctrine is when applied to courts and to persons exercising judicial or quasi-judicial functions, it has never been supposed that it deprived the legislature of the power of changing the rules of evidence, or of modifying or abrogating altogether the presumptions indulged by the principles of the common law. If the legislature may provide for a discovery of evidence in the hands of the adversary, it must be competent for it to impose upon such party the conditions of a failure to make such discovery; for when the legislature requires the discovery to be made and imposes the conditions of a refusal, such conditions must become the law of the land, and to pursue the statute is due process of law.* (Citing *Bagg's case*, cited in *Hovey vs. Elliott*, 167 *U. S.*, 416.)"

Mr. Justice Whitfield delivered a very able concurring opinion in which he places the matter in an exceedingly clear light, and distinguishes the case from *Hovey vs. Elliott.* After stating that the defendant was a non-resident, within the meaning of the code provision, he says:

"The legal entity, of course, can not testify. But interrogatories may properly enough be addressed to it, to be referred to and answered by its appropriate agent, within whose knowledge the information sought may be. * * *

"The statute, thus interpreted, is constitutional as we apply it. The doctrine of *Hovey vs. Elliott*, 167 *U. S.*, 416, is in perfect harmony with this view. That case simply held that the plenary power of punishing for contempt could not be abused, by converting it into a means of denying the party in contempt all right to be heard at all. The statute—Section 1761—has no such purpose. The case has no application here. The interrogatories must be proper interrogatories, appropriate to the cause and relevant to the issue. The statute is a beneficial one, wisely applied; but it should not be abused. The contention here is not as to the relevancy of the issue of the particular interrogatories, but one which denies, absolutely, the power of the legislature to require any interrogatories to be answered, merely because the appellant is a corporation."

We can not add to the strength or clearness of the above language. The court, in that case, adopts absolutely the ground which we take here—that the legislature had the power to change and abrogate the common law rules of evidence and procedure, without impinging on the due process of law guaranteed by the Constitution. As is said by Mr. Justice Teral, "*When the legislature requires the discovery to be made and imposes the conditions of a refusal, such conditions must become the law of the land, and to pursue the statute is due process.*" The distinction

made by Mr. Justice Whitfield, between the case under consideration and *Hovey vs. Elliott,* applies with equal force to the case at bar; and it is a conclusive answer to that portion of the appellant's argument which invokes that case. And it will be further noticed that Mr. Justice Whitfield, in his closing sentence, points out the very proposition urged by us in another portion of this brief—that, if the appellant could lawfully refuse to answer or produce any evidence, such refusal must be on a hearing of what will be asked it, and not a refusal in gross to produce any evidence at all, and an assumption that the question asked will be incompetent.

Upon the authority and the unimpeachable reasoning of this case, we feel that we might safely rest; and we submit that it controls this case absolutely upon this feature. Whether or not such a judgment by default was within the contemplation of the "law of the land" or "due process of law," as those words would be defined by reference to common law principles and rules of procedure and evidence, the Act of the legislature, passed in the exercise of its plenary power to control those matters, defined the law of the land, and "to pursue the statute is due process."

Learned counsel for the appellant have attempted to break the force of the decision and the distinction

taken in *Ill. Cent. Ry. vs. Sanford, supra,* by saying that the legislature, in its power to prescribe rules of evidence, is not unlimited, and that it can not, under such pretense, go so far as to preclude a party from establishing his rights: i. e., it can not refuse him an opportunity to be heard.

We have never contended that our legislature could do this. All that we have ever said is that the legislature has the power to change rules of evidence and forms of procedure and substitute for the common law in those matters any rules it sees fit, so long as there are left to a party his fundamental right of NOTICE OF SOME KIND and OPPORTUNITY TO BE HEARD IN SOME MANNER OR ACCORDING TO SOME RULE WHICH ALLOWS HIM TO PRESENT HIS CLAIM OF DEFENSE, *IF HE WILL.*

It seems to us that the whole difficulty lies in the misconception of the sphere and power of the legislature in this behalf. Learned counsel for the plaintiff in error in the argument below never seemed able to get away from the idea that there were some indestructible and sacred forms in the common law. The repeatedly asserted that the power to compel discovery was limited to those cases where, under the Chancery Practice of Eng-

land, it might be compelled under common law principles. In this position they forget that with the legislature of each State is lodged a power to abrogate and abandon as much of the common law procedure as it may see fit—that there is nothing sacred in any of its rules. The Supreme Court of Mississippi was entirely correct when it asserted that the legislature had the power to make the change which was made by the code provision under consideration; and, following out the reasoning on which such holding is based, it could even have gone further and extended the right of discovery, in terms, to penal as well as civil actions—to cases where discovery would not lie in chancery, in England, as well as to cases where it would. The only limitation upon the legislature is, as stated above, that it must always provide for notice of some sort and some sort of opportunity to be heard.

Under the principles hereinbefore developed and under the authority of the case last cited, we think it clear that the Act of 1905 was a valid Act, within the constitutional powers of the State, and not in violation of the 14th Amendment, even if the procedure prescribed by it had been ever so novel and unprecedented. But as a matter of fact the legislation of this country abounds in statutes, designed to empower the courts to compel the parties to suits to testify or produce evi-

dence therein, and authorizing judgments against them for failure or refusal so to do. We shall therefore next proceed to review some of these statutes of the various States and cite cases in which they have been recognized and applied.

In the course of the development of the law and the gradual supplementing and supplanting of common law ideas by State statutes, dictated by the changed circumstances of modern times, it has been found that such statutes are frequently necessary. It is often a great temptation for a party to take advantage of his dual relation as party and witness, and, where his evidence is necessary to the proper determination of his adversary's rights, to attempt to avoid examination. It has never been doubted that the States had the right to deal with such matters by prescribing any appropriate rules for enforcing fairness. And, while the fact that a statute exists, authorizing a certain procedure, is not conclusive that the legislature had the auhority to pass it, yet there is force in the proposition that, where by common construction of many States a certain class of statutes have been deemed within the power of the legislature, their very generality affords affords strong evidence of the practical and correct construction of the constitutional power of the legislature in such matters.

Pursuing this analogy, we have examined the statutes and decisions of many States, and find that provisions obligating parties to testify or produce evidence, and subjecting them to default or non-suit on refusal so to do, have been favored and upheld quite generally. Such statutes are highly remedial and should be liberally construed to advance the due administration of justice.

People vs. Nussbaum, 55 *N. Y. App. Div.*, 245.

No more forceful evidence of the estimate placed upon the constitutionality of such laws by the framers of the Constitution of the United States can be had than the fact that the first Congress of the United States, in 1789, passed such an Act.

Section 724 of the Revised Statutes of the United States (3 Fed. Stat. Ann., 2-3), a part of the Judiciary Act of Sept. 24, 1789, reads as follows:

"In the trial of actions at law, the courts of the United States may, on motion and due notice thereof, require the parties to produce books and writings in their possession or power which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery.

"If a plaintiff fails to comply with such order, the court may, on motion, give the like judgment for the defendant as in cases of non-suit; and if a defendant

fails to comply with such order, the court may, on motion, give judgment against him by default."

This statute was enacted by the same Congress which proposed the 5th Article of Amendment to the Constitution of the United States, wherein, for the first time in the Constitution, is embodied the phrase, "due process of law," and whereby the Federal Government was forbidden to deprive any person of his life, liberty or property without due process of law.

If the phrase, "due process of law," works a restriction upon the Federal Government such as is contended for by the appellant in this case, and if any statute which provides that, for failure to produce evidence, a default judgment may be rendered is in violation of this provision, we have the very men who coined the expression as pioneers in its violation. We maintain, however, that the very fact that the contemporaneous construction given to the provision by those who framed and voted for it is to the effect that it does not forbid the passage of such a statute leads irresistibly to the conclusion that it was never intended to inhibit such legislation.

As is well said in 8 *Fed. Stat. Ann.*, 264-5:

"Legislation by Congress immediately following the adoption of the Constitution, and legislation enacted at the time of proposing or immediately follow-

ing the proposal or adoption of an amendment, is authoritative in determining the scope of the constitutional provision and is entitled to great weight. The first ten articles of the amendments to the Constitution were proposed by the first Congress of the United States, at its first session, on September 25, 1789. At the same session, an Act was passed 'to regulate the collection of the duties imposed by law on the tonnage of ships or vessels, and on goods, wares and merchandise, imported into the United States.' The statute authorized the customs to seize and search for goods suspected of having been fraudulently entered or concealed. It can not be suggested, with any force, that the same Congress which proposed the amendments could have regarded the 4th and 5th Amendments as forbidding the enactment of those or of kindred provisions. At the same session, the Act of September 25, 1789, commonly known as the Judiciary Act, was passed. As an important legislative construction of the Seventh Article of the Amendments, guaranteeing the right of trial by jury in suits at common law, where the value in controversy exceeds $20, that a statute giving such a summary judgment is consistent with it, the 15th Section of the Judiciary Act provided that the courts of the United States 'shall have power, in the trial of actions at law, on motion and due notice thereof being given, to require the parties to produce books or writings in their possession or power which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery; and if the plaintiff shall fail to comply with such order to produce books or writings, it shall be lawful for the courts respectively, on motion, to give the like judgment for the defendant as in cases of non-suit; and if a defendant shall fail to comply with such order to produce books or writings, it shall be lawful for the courts respective-

ly, on motion as aforesaid, to give judgment against him or her by default.'

"By Section 25 of the same statute, appellate jurisdiction was given to the Supreme Court of the United States, from 'a final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of such validity; or where is drawn in question the construction of any clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party under such clause of the Constitution, treaty, statute or commission.'

"In the course of an opinion sustaining the constitutional right of the Supreme Court of the United States, under Section 2 of Article 3 of the Constitution, to review the judgment and decree of the supreme courts of the several States wherein Federal questions were involved, Chief Justice Marshall said:

"'We know that in the Congress which passed that Act were many eminent members of the convention which formed the Constitution. Not a single individual, so far as is known, supposed that part of the Act which gives the Supreme Court appellate jurisdiction over the judgments of the State courts in the cases therein specified, to be unauthorized by the Constitution.'

"The Civil Rights Bill of April 9, 1866, was passed by the Congress succeeding the one which pro-

posed the 13th Amendment, and it was said that this fact was not without weight and significance in determining whether the Amendment gave to Congress the power to enact the statute."

It will thus be seen that the contemporaneous construction given to the phrase, "due process of law," by those who were identified with its adoption and history, as same is shown by the section of the Judiciary Act above quoted, was that the idea of a default judgment rendered after striking out a plea for refusal to produce evidence was not violative of the spirit of that phrase.

This statute has always been regarded as constitutional and has been enforced in numerous cases by the Federal courts.

Indeed, though we find numerous cases construing the statute and defining the steps necessary in thus producing evidence of an adverse party upon pain of a default judgment (where the party happens to be the defendant), it does not seem that the idea ever occurred to the courts or to counsel in these many cases that there could be any doubt that a default judgment rendered in pursuance to the statute was "due process of law." The statute has been in this way repeatedly before the courts and has been treated as valid by many able and eminent judges.

Thus, in 1818 and 1821, Mr. Justice Washington, construed the statute, and treated it as valid in

Bas vs. Steele, 3 *Wash.*, 381.
Dunham vs. Riley, 4 *Wash.*, 126.

And in 1857, in *Thompson vs. Tilden*, 20 *How.*, 194, this court, through Mr. Chief Justice Taney, construed the section referred to and recognized its validity.

See also:

Bank of U. S. vs. Kurtz (1822), 2 *Cr. C. C.*, 342.
Maye vs. Carberry (1822), *Ib.*, 336.

and other cases cited in

3 *Fed. St. Ann.*, 5, *note to R. S., Sec.* 724.

And, in 1899, in the case of the *Victor G. Bloede Co. vs. Bancroft*, 98 *F.*, 175, Bradford, D. J., in a very able opinion upon a careful review of the many cases, settled the rule that, under this section of the statutes, in proper cases, production of books, papers and documents could be ordered before as well as at the time of trial, under penalty of default judgment. No question is specifically raised as to "due process of law," but, *sub silento*, the Act is held valid and enforceable.

See also:

Gray vs. Schneider (1902), 119 *F.*, 174.
Henszey vs. Langdon-Henszey Coal Min. Co., (1897), 80 *F.*, 178.

It seems to us that this contemporaneous construction of the "due process phrase" of the 5th Amendment, made by its very authors, and acquiesced in by the courts for over a hundred years, without question, is the strongest possible argument that a procedure which authorizes a default judgment against a defendant who refuses, when ordered so to do, to produce evidence or to testify, is not violative of the due process phrase as therein used.

But we further call attention to the fact that such legislation has been passed and enforced in many of the States, and has never been held to be violative of the idea of due process as embodied in the several State Constitutions.

The Code of Missouri (2 *R. S.* 1855, *p.* 1577) provided (Sec. 3) that either party to a suit might compel the other to testify at the trial or by deposition. Sec. 4 provided that:

"If a party refuses to attend, * * * and testify, either in court or before any person authorized to take his deposition, besides being punished himself as for a contempt, his petition, answer or reply may be rejected, or a motion, if made by himself, overruled, or, if made by the adverse party, sustained."

In *Haskin vs. Sullivan,* 31 *Mo.,* 435 (1862), the court, applying this statute to a case where the de-

fendant being summoned and refusing to attend and testify, his answer was stricken out and judgment given for the plaintiff, after quoting the statute, says:

"For aught that appears, the court below very properly exercised its discretion in striking out the answer and entering judgment. * * * The court in such cases, instead of enforcing obedience to its powers by attachment, may deprive a party of the benefit of his pleading, and *thus prevent an advantage which his double relation may tempt him to take by absenting himself from court, when his testimony may be solely relied upon by his adversary.*"

In *Snyder vs. Raab*, 40 *Mo.*, 166 (1867), this statute was applied in an ejectment suit where the plaintiff caused the defendant to be subpœnaed as a witness in his behalf, and the defendant failed to appear and testify at the trial. The court, on motion, struck out his answer and proceeded to give judgment by default for plaintiff.

The court say, at page 167:

"The court was sufficiently authorized, upon the failure of the defendant to appear and testify at the trial, to reject—or, what amounts to the same thing, to strike out—the defendant's answer. (*R. S.*, 1855, 1577, *Sec.* 4.) There is nothing to show that there was anything harsh or improper in the action of the court in this matter, and we can not interfere with it. The plaintiff chooses to stand upon the judgment as it was entered up for him, and the *defendant is in no condition to complain.*"

In *Carr vs. Davis,* 46 *Mo. App.,* 351 (1891), the defendant, being subpœnaed as a witness for the plaintiff, failed to attend. The circuit court, on motion of plaintiff, struck out the answer and rendered judgment by default, for want of an answer. Subsequently, on showing, the circuit court set aside the default and the plaintiff took the case to the court of appeals. That court held that the default judgment was properly rendered.

In *Royer & Harwood vs. German,* 48 *Mo. App.* (1892), 510, the court applied the statute to the plaintiff, struck out his petition and entered judgment against him, for refusal to testify when summoned by the defendant.

In *Dustin vs. Farrelly,* 81 *Mo. App.,* 380, the statute was recognized, but construed as giving the court a discretion, when the party really did appear and testify, but refused to answer certain questions.

In *Larrimore vs. Bobb,* 114 *Mo.,* 466 (1893), 21 *S. W.,* 922, the statute was again enforced by requiring a plaintiff, at the instance of a defendant brought in after the plaintiff had once testified on motion of one defendant, to testify again or suffer dismissal.

In New York the Code (*Secs.* 391-4) authorizes the examination of parties as witnesses before trial,

and provides that, if the party refuses to attend and testify, he may be punished for a contempt and his complaint, answer or reply may be stricken out. In *Gaughe vs. Laroche,* 6 *Duer,* 685, 14 *How. Pr.,* 451 (1857), the court ordered a *subpoena duces tecum* against the defendant, requiring him to produce certain evidence, which he failed to do. Judgment was therefore rendered against him. At page 453 (14 *How.*) the court say:

"If the appellant finds it more important to have the actual examination, he may procure the attendance by warrant under the statute. If he is content with the remedy given by Section 314, he may adopt it, and, no doubt, proceed as for contempt, and also have the pleading stricken out or have either of these modes of redress. Under the practice in chancery which obtained in this State prior to the adoption of the code, a plaintiff could file a bill of discovery and require the defendant to make a full, true and complete answer to such interrogatories material to the cause as the plaintiff might propound, and, when the defendant had made full, true and complete answers to such interrogatories, the plaintiff could read defendant's answers in evidence in support of the allegation in his bill. 2 *Dan. Ch. Pr.,* 1537. *Story Eq., Sec.* 1483; *Eck vs. Hatcher,* 58 *Mo.,* 235. The code abolished the distinction in practice between law and equity, and with it the bill of discovery, and has substituted in its place Secs. 4013-4016, R. S., 1879, which provide that any party to a civil action may compel the adverse party to testify as a witness; and if such party, on being duly summoned, refused to attend and testify, either in court or before any person authorized to take his

deposition, besides being punished as for comtempt, his petition, answer or reply may be rejected. * * * The defendant's failure to obey the court's writ of subpoena was, *ipso facto,* a contempt of court, which fully authorized the exercise of its discretion in rejecting his answer, and rendering judgment against him by *nil dicit.* * * * It will be observed by reference to Sec. 4016, R. S., supra, that the court was then invested with a double, separate power. It may first punish the defendant himself as for contempt, and second, besides, reject his petition, answer or reply. So that, in the case under consideration, the matter of punishment for the contempt was one wholly between the defendant and the court and with which the plaintiff had no concern."

The Code of New York (1 *Stevens Ann. Code* 1902) further provides, by section 852 thereof, for the issuance and service of *subpoena duces tecum.* Section 853, providing the punishment for disobedience of such subpoena, prescribes that in addition to being punished for contempt, such person shall be liable in damages and in witness penalties, and to the party aggrieved, and further, that "if he is a party to the action in which he is subpoenaed, the court may, as an additional punishment, strike out his pleading." (2 *R. S.,* 400, *Sec.* 43, being part of *Code Prac., Sec.* 394.)

In *Shelp vs. Morrison,* 15 *Hun.,* 110 (1878), the defendant subpoenaed the plaintiff to produce a certain bond, and the plaintiff refused to do so. The

court thereupon ordered the complaint striken out. This action was sustained upon appeal, the court holding that it was authorized by the section of the code above set out, and saying, at pages 111-3:

"As this was a material paper and in the possession of the plaintiff or his counsel on the trial, the court, on request of the defendant, could order its production, and if he refused could strike out the complaint."

In *Richards vs. Judd* (1874), 15 *Abb. Pr. N. S.*, 184, the court held that it was proper to strike a complaint because the plaintiff had refused to answer fully certain questions by the defendant.

In New Hampshire the statue (*Chap.* 189, *R. S. N. H., Sec.* 1843) provides for the appointment by the court of auditors to state accounts in suits pending. It is further provided that:

"Sec. 6. If either party shall neglect or refuse to appear before the auditor, and to render an account, or to produce such books and papers and to answer under oath such interrogatories relating to the matter in controversy as may be pertinent and material, the auditor shall certify the same to the court.

"Sec. 7. The court shall thereupon render judgment against such party, as upon non-suit or default, and, if necessary, cause the damage to be assessed by the jury."

In *Whitton vs. Wiggin*, 34 *N. H.*, 215, an auditor appointed under this Act gave the defendant notice

to appear before him at a certain time and place. Upon his failure to do so, and the report of the same to the court, on motion of the plaintiff the defendant was defaulted. This action was sustained by the Supreme Court. Puley, S. J., after stating the facts and the substance of the Act, says, at page 217:

"The defendant has neglected to appear, and, following the language of the statute, the courts are to render judgment against him, as upon default; and such, we think, is the meaning of the Act. The party, on due notice, is bound to appear before the auditor to whom the cause has been referred, and maintain his action or defense in the same way he is bound to appear in court; and when the auditor reports the fact that he has neglected to appear, the statute treats his case as if he were non-suit or default in court. * * * If after due notice he wholly neglects to appear, by himself or counsel, he *abandons* his suit or defense, and the intention of the statute was that in such case he should be treated as if he were non-suit or default in court."

In Indiana (*Code Ind., Secs.* 295-9; *R. S.,* 1881, *Secs.* 509-513) by the code it is provided that any party to an action may be examined as a witness concerning any matter stated in the pleading, either at the trial, conditionally, or by deposition. Passing over sections providing for notice and enforcement of attendance, it further provides that, "Any party refusing to attend and testify as above provided may be punished as for a contempt and his complaint, answer or reply

may be stricken out." (*Code, Sec.* 299; *R. S., Sec.* 513.)

In *Belton vs. Smith,* 5 *Ind.,* 291, the plaintiff had the defendants summoned as witnesses and they failed to appear and testify. The court thereupon struck out their answers and rendered judgment against them *pro confesso.* This was alleged to be error and not authorized by the statute. The court say, at page 244:

"It is provided by Sec. 299 of the code (G. & H., 188) that 'any party refusing to attend and testify as above provided, may be punished for a contempt, and his complaint, answer or reply may be stricken out.'

"It appears that the court below rendered judgment against the appellants, as upon a confession, for their failure to attend and testify as witnesses for the plaintiff. *This was in effect the same as striking out their answer, in which case judgment would have been rendered against them for want of answer.* We think that appellants have no right to complain of this action of the court. They had been duly summoned to testify for the plaintiff, in reference to a question peculiarly within their knowledge. They failed and refused to obey the process of the court and were guilty of contempt, for which they might have been punished. The court, however, did not resort to this extreme remedy, but treated as true the allegations of the complaint affecting them, and rendered judgment accordingly. This was in accordance with the spirit of the statute, and less than this the court could not have done."

In *Trippe vs. Carr,* 80 *Ind.,* 371, this statute was upheld and applied. Certain defendants, being sum-

moned by the plaintiff as witnesses, failed and refused to appear and testify. Thereupon the defendant moved the court to strike out their answers and render judgment against them as by default. The court refused to do so and the plaintiff appealed. Held, that for this error the judgment should be reversed. The court say, at page 373:

"The plaintiff in this case, having had two of the defendants duly summoned as witnesses for him, and they having failed to appear, *he had a right to have their answers stricken out and judgments rendered against them for want of answers.* * * *

"Wather and Huncheon ought to have obeyed a subpoena duly served; if they had any excuse or reason for not obeying it, the same ought to have been shown in answer to the motion to strike out their answers." (373.)

In *Bish vs. Beatty,* 111 *Ind.,* 403, 12 *N. E.,* 523, a party was notified informally to appear and testify, but was never subpoenaed as required by law. It was held that the statute was not applicable to such a case, but its validity was expressly recognized. The court say, at page 405 (111 Ind.):

"The attendance of a party may be enforced, and his refusal to attend and testify may be punished as for contempt and the complaint, answer and reply of the party in default may be stricken out.

"Rightly used, such statutes are important factors in the administration of justice. They are applied

with a view to maintain just ends, and not as mere instruments by which one party may harass his adversary."

The power to strike out pleadings and render judgment against a recusant party is also recognized in

Chaffin vs. Brownsfield, 88 *Ind.*, 305, 307.

Wisconsin has a similar statute (*R. S., Secs.* 54-55, *Ch.* 137), which is recognized as valid in *First National Bank vs. Wood*, 26 *Wis.*, 500.

And in *Eastern Ry. of Minn. vs. Tuteur* (*Wis.*), 105 *N. W.*, 1067, in an action by the railway company, the defendant made an effort to examine before a commissioner an attorney for the plaintiff. The statute under which the motion was made (*R. S., Secs.* 4096-7) provides for the examination of either party, at the instance of the other, or, where a corporation is a party, of its president, secretary or other principal officer or managing agent. It further provides that a party who, when thus called upon to give evidence, refuses, shall, in addition to being punished for contempt, be subject to having his pleadings stricken out and judgment given against him as upon failure of proof or by default. The trial court denied the application for the order of examination and the Supreme Court affirmed the case, holding that the making or

refusing of the order was a matter within the sound discretion of the court and that there was no showing that there had been an abuse of discretion. The court does, however, recognize the existence of the power and the validity of the statute.

Another analogous class of statutes, closely resembling the last mentioned ones, provides in general that either party may, with his pleadings, file interrogatories to the adverse party, which must be answered under penalty of non-suit or default.

The statutes are found in many of the States and have been universally applied and upheld.

"The plaintiff may take a judgment by default on the defendant's failure to answer interrogatories filed under a statute."

6 *Pl. & Pr.*, 25.

Alabama has such a statute, which has been repeatedly recognized and held valid. In *Young vs. McLaurence*, 3 *Ala.* (1842), 295, 296, the plaintiff filed interrogatories to the defendant under the Act of 1837. Upon his failure to answer, judgment by default was rendered. The judgment was of the failure to properly assess damages by calling a jury. But the court say, at page 296:

"The questions of law arising in this case grow out of the statute passed Dec. 23, 1837, the design of which was to supersede the necessity of resorting to chancery to obtain a discovery of facts resting on the knowledge of a party to the suit. * * * The statute provides that if the party to whom such interrogatories shall be propounded be defendant in the action, it may set aside his plea or pleas and give judgment against him by default. The effect then of the contumacy of the defendant is precisely the same as if, after service of process, he had failed to appear and plead. This would authorize a judgment against him by default, and would, in such case as the present, be an admission that the plaintiff was entitled to some damages."

See also:

Goodwin vs. Harrison, 6 *Ala.*, 438.

Indiana has such a statute, and in *Reed vs. Spayde*, 56 *Ind.*, 394, a default judgment, rendered by the circuit court for failure of a defendant to answer such interrogatories, was affirmed.

Massachusetts has such a statute (*Mass. Pub. St.* 167, *Secs.* 49-60), providing that either party to a civil action may file interrogatories for the discovery of facts material to his case, to be answered on oath by the adverse party; and that if such party, within a certain time, neglects or refuses to answer such interrogatories, the court may enter a non-suit, if he be a plaintiff, or a default, if he be defendant.

This statute has been recognized and applied repeatedly.

See:

Files vs. Raymond, 139 *Mass.,* 98, 100.
Harding vs. Noyes, 125 *Mass.,* 572.
Harding vs. Morril, 136 *Mass.,* 291.

In *Files vs. Raymond, supra,* it is said:

"It is entirely clear that most of the interrogatories relate to facts material to the defense and are such as the plaintiff was required to answer. If he objected to certain specific interrogatories, his proper course was to answer such as were pertinent, and take judgment or ruling of the court upon such as he claimed to be impertinent. He neglected to answer any of the interrogatories, and for the neglect of it, it was in the power of the superior court, in its discretion, to order a non-suit."

The Iowa statute on the same proposition has also been upheld and enforced.

In *Sully vs. Wilson,* 44 *Iowa,* 394, it is said:

"If it be true that the interrogatories were not answered, the defendants would have been entitled to judgment under the provisions of Section 2699 of the Code. Where the plaintiff fails to reply to interrogatories attached to the answer the defendant is entitled to judgment, if demanded in the trial court."

See also:

Teas vs. McDonald, 13 *Texas,* 394.

A statute of Washington provides that either party may file with his pleadings interrogatories addressed to the opposite party, and that, on failure or refusal of the party to answer, he may be punished for contempt, and, in addition, that his pleadings may be stricken out and judgment rendered against him as by non-suit or default.

In *Lawson vs. Black Diam. C. Min. Co.*, 86 *Pac.*, 1120, this section was held to be constitutional, though the case there presented was not considered as one properly authorizing a default judgment against the defendant. The court say, at page 1121:

"If the statute be construed as authorizing the striking of the answer and the taking of judgment by default for failure to answer interrogatories, solely as a punishment for contempt, and without any regard to the substance of the interrogatories, or the nature of the discovery sought, this objection would seem to be well taken. (*Citing Howey vs. Elliott*, and other cases here relied upon by appellant.) *If, on the other hand, the refusal of a party to attend and testify at the trial, or to give his deposition, be treated as an implied admission of the facts at issue on his part, the same as a failure to deny the allegations of a pleading, we think the statute is free from constitutional objection. From a party's refusal to testify, it may well be presumed that, if his testimony were given, it would sustain the cause of action or defense of his adversary, and we think this is a presumption the law and courts have a right to indulge. On the same principle the refusal of a party to answer interrogatories may be treated as a implied admission of the facts in relation to which a discovery is sought.*"

Arkansas has long had a statute, relating to actions by equitable proceedings, allowing either party to annex interrogatories to his pleadings, and requiring the opposite party to answer same on pain of having his action dismissed, if he be the plaintiff, or his answer quashed and judgment by default rendered against him, if he be the defendant.

Kirby's Digest, Secs. 6154-6.

The constitutionality of this statute has never been questioned and it has long been a most useful provision of our Code of Practice.

Another close analogy is furnished by that class of statutes providing for the rendition of judgments by default, for refusal of a party, duly notified, to produce books, papers and documents.

As we have already had occasion to notice, Congress, in 1789, passed such a statute. (*See R. S. U. S., Sec.* 724; 3 *Fed. St. Ann.*, 283.)

We have set out the statute in full, in connection with our argument upon the contemporaneous construction by Congress of the phrase, "due process of law," and we will not repeat it here.

Georgia has such a statute (*Civil Code, Secs.* 5248-50), whereby the courts are given power in certain

cases, on notice given by one party, to require the opposite party to produce all books, papers and writings in his possession, power, custody and control, pertinent to the issues. It is further provided that:

"If the plaintiff or his attorney, being so notified, shall fail and refuse to comply with such order, the court shall, on motion, give judgment against such plaintiff as in case of non-suit; and *if the defendant shall fail or refuse to comply therewith, the court, on motion, shall give judgment against such defendant, as in case of judgment by default.*"

In *Georgia Iron & Coal Co. vs. Etowah Iron Co.*, 30 *S. E.*, 878, judgment as by default was entered against the defendant under this provision of the code. The Supreme Court held that the order granted in the case was too broad, under this particular provision of the code on which it was based, and that the application therefor was not in the form required; but the validity of the statute and of a default judgment thereunder is recognized, when the prescribed procedure is correctly followed.

See also as recognizing the validity of the provision:

Am. Ntl. Bank vs. Brunswick Light & W. Co., 100 *Ga.*, 92; 26 *S. E.*, 473.

We believe that the foregoing authorities, so directly recognizing the power of the State to default

a defendant who refuses to deal fairly with the court and his adversary and disclose the truth, are conclusive that in such procedure there is no denial of the due process of law.

There must exist an inherent power in the State to authorize its courts to sift controversies and get at facts. When the testimony of a defendant is alleged to be essential and relevant to the case of the plaintiff there must exist some power in the court to compel its production. Otherwise a defendant in such a case would need no better defense than his own contumacy. By refusing to testify or produce evidence he could prevent recovery by the plaintiff; and by keeping beyond the boundaries of the State he could avoid attachment for contempt. If the States have not this power, then courts are but mockeries, to be obeyed or flouted at convenience. This is the common sense of the proposition; and the courts and the Constitution of the United States were never meant to subvert common sense or to be used as instruments to defeat the due administration of justice. The legislature of the State had the right to deal with this quesion and subject defendants to just penalties for such recusance.

The Statute of 1905 is a piece of legislation passed in the exercise of this inherent right of the State,

and the principle thereof has often been asserted and never doubted as unconstitutional.

But in addition to these direct authorities, there exist many analogies for it in the common and statute law, demonstrating at once the importance and the indisputability of the right of the State to control the procedure in its own courts and to prescribe rules for the non-observance of which judgments as by default or non-suit may be entered.

Stated in its logical breadth, the position of the plaintiff in error here is that, having filed an answer of some kind, it is entitled to try the case on the issues thus formed, whether or not it has observed all the forms and duties which the State has prescribed as applicable to it. It contends that the due process of law clause guarantees it against any requirement to do more than tender an issue in such form as it sees fit; and that this being done, no judgment can be rendered against it except upon a hearing of evidence.

If these propositions were true, in their breadth, many of the most ordinary and useful statutes governing pleading and procedure would be unconstitutional.

Amongst the statutes which would fall within this condemnation would be all of those which require the

verification of pleadings. In nearly all the States there are such statutes, providing that, on refusal to verify pleadings, they may be disregarded and judgment rendered as by non-suit or default. Such judgments have never been held to deny due process of law.

Another class of these statutes are those requiring affidavits of defense or merits to be filed with answers and authorizing default judgments for refusal to comply therewith.

Regarding this practice, Mr. Black says:

"According to the practice at common law in some of the States, when an action is brought upon an obligation for the payment of a sum certain in money, if the defendant means to contest it, he is required to file, within a limited time after notice of the plaintiff's statement, an affidavit setting forth the facts on which he means to rely as a defense. *If he fails to do this, judgment may be taken* against him, 'for want of an affidavit of defense.' "

1 *Bl. Judg., S.*, 79 *a.*

Citing *Tobyhanna & L. Lumber Co. vs. Home Ins. Co.*, 107 *Pa.*, 231; 31 *a*, 564.

And it is held that the plaintiff's right to a default judgment is not affected by appearance of defendant by attorney within time, if affidavit not filed.

North vs. Yorke, 174 *Pa. St.*, 349; 34 *A.*, 845.

Illinois has such a statute (*R. S.* 1874, *Ch.* 110, *Sec.* 37), providing that:

"If the plaintiff in any suit upon a contract, express or implied, for the payment of money, shall file with his declaration an affidavit showing the nature of his demand, and the amount due him from the defendant, after allowing the defendant all his just credits, deductions and set-offs, if any, he shall be entitled to judgment as in case of default, unless the defendant, his agent or attorney, if defendant, is a resident of the county in which the suit is brought, shall file with his plea an affidavit, stating that he verily believes he has a good defense to said suit."

In *Honore vs. Home Natl. Bank,* 80 *Ill.,* 489, this statute was applied and declared to be constitutional. The court say, at page 492:

"The plaintiff then, having complied with the 37th section of the statute, defendant was required to file an affidavit of merit as a condition to the right to plead. Or, in other words, to entitle a plea to the merits to be filed, its truth, in whole or in part, in effect, is required to be verified by affidavit. Appellant not having thus verified his plea, it was improperly filed; and the court below did not err in striking it from the files, and when so stricken out, the court, under the statute, had full power to render judgment as though no plea had ever been filed.

"But it is urged that this section is unconstitutional. The General Assembly has the undoubted right and ample power to prescribe the practice of our courts, and to alter and change the same as they may think the promotion of justice requires. We have never heard it questioned that the General Assembly

has the power to require any and all pleadings to be sworn to as a condition precedent to their being in a case."

In *Wilder vs. Anderson*, 80 *Ill.*, 435, it is said that:

"Where a plea is filed without an affidavit of merits in a case where an affidavit of merits is required by statute, plaintiff is entitled to judgment by default."

"When defendant fails to file an affidavit of merits with his plea, as required by statute, *it is proper to strike the plea from the files and render judgment by default.*"

Goldic vs. McDonald, 78 *Ill.*, 605.

Young vs. Browning, 71 *Ill.*, 44.

Mussachusetts has such an Act providing that:

"In all actions at law in the Supreme Judicial Court, or Superior Court, the court shall, at any time after ten days from the return day of the writ, or as of course on the last day of the return term, enter a default against any defendant on whom legal service has been made, unless defendant or some one in his behalf has filed within said ten days, or on or before the last day of said term when the same does not exceed ten days, an affidavit that he verily believes that the defendant has a substantial defense to the action on its merits, and intends to bring the same to trial; provided, that upon good cause shown the time for filing such affidavit may be extended for such reasonable time as the court may order."

In *Hunt vs. Lucas*, 99 *Mass.*, 404, this Act was held constitutional and applied.

In Pennslyvania it was held that:

"When defendant is required by statute or rule of court to file an affidavit of defense within a required time, his default may be entered for failure to comply with the law. The judgment rendered for want of such affidavit is one by default."

Bayard vs. Gillaspy, 1 *Miles* (*Pa.*), 256.

See also:

Bright vs. Oakdale, etc., Co., 10 *Phila.,* 609.

6 *Enc. Pl. and Pr.,* 79-80.

In Connecticut a statute provides that, in causes when an attorney appears for the defendant, the plaintiff may require him to state to the court whether he believes a *bona fide* defense exists to the action, whether such defense will be made, and whether there will be a trial; and that, if such attorney refuses to disclose as required, or shall not satisfy the court that such defense will be made or such trial had, the court may order judgment for the plaintiff.

This statute has been upheld and applied.

See:

Jennings vs. Parsons, 71 *Conn.,* 413.

In West Virginia the statute (*Sec.* 46, *C.* 125, *Code* 1899) provides that:

"No plea shall be filed in the case either at rules or in court, unless the defendant shall file with the plea his affidavit that there is not as he verily believes any sum due from him to the plaintiff upon the demand or demands stated in plaintiff's declaration. * * * If such plea and affidavit be not filed, judgment shall be entered for the plaintiff by the court for the sum stated in the affidavit with interest thereon from the date of the affidavit until paid."

In *Hurlburt & Sons vs. Straub*, 46 *S. E.*, 163, the Supreme Court reversed a judgment of the lower court for failing to apply this statute when properly quoted, saying:

"This language is imperative, and gives the court no discretionary power in relation thereto. If the affidavit is not filed the court must enter up judgment in favor of the plaintiff, and if he refuses to do so, and arbitrarily sets aside the office judgment, his action is *coram non judice*, and he may be compelled to enter up judgment thereon by mandamus."

Citing:

Mastillar vs. Ward, 52 *W. Va.*, 74; 43 *S. E.*, 178.

Guesenbury vs. Peoples Bldg. & Loan Assn., 44 *W. Va.*, 512; 30 *S. E.*, 73.

Instances of the enactment and enforcement of such statutes are numerous; and, in the course of a thorough investigation thereof, we have found no instance where it was ever contended that such statutes denied the due process of law.

We deduce from the authorities hereinbefore noted the following results:

1st. *That the essentials of due process of law as required by the 14th Amendment are notice and opportunity to defend.*

2nd. *That a party has no constitutional right to any particular form of procedure or to have applied to a case the rules of procedure which are derived from the common law.*

3rd. *That the States, subject only to the qualification that they can not wholly deny a defendant some sort of terms, have the free and uncontrolled right to prescribe new forms of procedure and impose terms and conditions upon parties in their courts.*

4th. *That there is no fixed standard by which the sufficiency of the notice or opportunity to be heard shall be measured; and that the States may constitutionally abolish the ordinary or common law rules governing the hearing of cases and substitute other procedures, so long as they give some sort of notice and opportunity to be heard.*

5th. *That arising out of the distinction between the powers of the States and of the Federal Government, there is a distinction between the due process*

of law under the 14th and the 5th Amendments, at least to the extent that the States may authorize procedures in their own courts, even unknown to the common law.

6th. That the contemporaneous construction of the due process phrase of the 5th Amendment, placed upon it by the Congress which proposed it, by the passage of the Act of 1789, hereinbefore discussed, demonstrates that a default judgment may be authorized by statute for refusal to produce evidence, without a denial of due process.

7th. That the legislation and decisions of the several States, authorizing such default judgments, demonstrate that same have never been regarded as denying the due process of law.

We respectfully submit that these numerous statutes of the States and of the United States are analogous to the Act in question. They all provide for default judgments, rendered because of the refusal of a party to submit his defense fully and fairly and upon the terms prescribed by law. If the default judgment here be one rendered without due process, the same would be true of a judgment in pursuance to any of these numerous statutes.

The fact that the First Congress of the United States, composed as it was of the very men who framed

the due process phrase of the 5th Amendment, did not so consider, and that the legislation of most of the States embraces analogous provisions, is, we think, an unanswerable argument in favor of its constitutionality.

A defendant who will not defend because not allowed to do so according to its own fancy and convenience is in no position to complain. One who sets up such a right seeks to dictate, to the State and its courts, the terms upon which he will allow his cause to be adjudicated. He is a defier and contumnor of the law, and stands but lamely to invoke the protection of the courts. He asks to be protected, but refuses to be fair and candid. Whether or not this is the mental attitude of those controlling the acts of the defendant corporation in this case, it is the legal aspect of their position.

We respectfully submit that Section Nine of the Act of 1905 is not violative of the due process phrase of the 14th Amendment; and, indeed, that it affords due process to any defendant embraced within its terms.

While all the assignments of errors grouped together under the heading of due process are practically reiterations of the same conclusion in different form,

yet there are some variation in the statement of grounds for the conclusion.

The fifteenth asisgnment contains an allegation that the persons named in the order were "not under the control of the plaintiff in error, or under any duty to appear as witnesses upon its request."

These statements, if they were entitled to any consideration upon the merits, if true, are not borne out by the record.

The motion for the order of examination (Record, 9-11) states specifically that the persons named therein are officers, agents, directors and employes of the defendant company. The company never denied it, either before or at the hearing on the motion. Nor did it make any such allegation when called upon to show cause against the entry of a default judgment. It presented many objections to the motion for such judgment; but it never once denied that the witnesses called for were its officers and agents and under its control. This being true, it can not make the defense for the first time merely by an allegation in an assignment of error.

The exact extent of the duty of the corporation in such a case as this is thus stated by Mr. Chief Justice Hill in the opinion in this cause. He says:

"If these provisions mean that the corporation must be a policeman and bring into court, on demand, its president, bookkeeper or doorkeeper, *vi et armis*, certainly it would be an unreasonable imposition. An analysis of these provisions, however, will not justify such a construction. These sections evidently mean this, and nothing more—that the corporation shall, on demand, request any given officer, agent or employe to be present at the time named for examination as a witness (and, in the case of production of books and papers, that the given officer, agent or employe produce the given papers), and on a failure to comply with these requirements, that it be defaulted. Of course this necessarily contemplates an honest effort to produce the testimony called for. When that is made, the statute is complied with; when it is not, as in this case, where the defendant corporation refused to obey any part of the order, then the statute is not complied with." (Record, 57.)

Hammond Packing Company vs. State,
81 *Ark.*, 519, 540-1.

Instead of performing this duty, the corporation in this case made a general and total refusal to produce any witnesses or books. It did not allege inability to induce the witnesses to attend; but wholly denied the right of the State to require it to request their attendance.

Under these circumstances the court is not called upon to decide what would be the rule if the witnesses named were not in any way under the control of the plaintiff in error, and it had made a showing thereof to the court which made the order of examination.

But, further than this, the statement that a corporation can not control its own servants is absurd on its face.

In the court below it was argued strenuously that it is no part of the duty of an officer or agent of a corporation to appear and testify at its request. Theoretically this may be true, though practically it is not. If the digression of counsel can justify us in a like offense, we would say that, *practically*, an agent or employe of a corporation usually does as he is told, and that the officers and directors are the mouthpieces and guiding influences of the corporation. The latter have little difficulty in exacting obedience to their wishes and orders, either from themselves or their underlings. As was said in a case construing the anti-trust law of Missouri, in answer to this same contention:

"Like the man in authority, who had soldiers under him, it says to one of these agents or officers, 'Go,' and he goeth; to another, 'Come,' and he cometh; and to its servant, 'Do this,' and he doeth it. By virtue of such commands its officers and agents fetch and carry."

State vs. Standard Oil Co. of Ind. (*Mo.*), 91 *S. W.*, 1070.

We believe that this disposes of all the assignments of error which assert that Section Nine of

the Act of 1905 is violative of the due process phrase of the 14th Amendment. We next pass to those which attack that section and the judgment as denying the equal protection of the laws, under the same Amendment.

2d. Equal protection of the laws.

The sixth, twelfth, sixteenth and eighteenth assignments assert that Section Nine and the judgment rendered in pursuance thereto deny to plaintiff in error the equal protection of the laws as guaranteed by the 14th Amendment.

The sixth and twelfth specify grounds upon which it is argued that an illegal discrimination is made; but the sixteenth and eighteenth are mere general statements, without specification of grounds, that the equal protection of the laws has been denied. We take it, therefore, that this feature of the case will be disposed of when we have answered the sixth and twelfth assignments.

The sixth assignment alleges error in holding that Section Nine and the judgment rendered thereunder were not repugnant to the equal protection clause, "even though said Section Nine did not authorize the rendition of a judgment against natural persons, under a similar state of case, natural persons, equally with

corporations, being embraced withir the section (8) of the statute authorizing the order of production."

Section Eight, the one authorizing the order of production, is not wholly unambiguous in its designation of the parties amenable to the procedure therein defined. But we think that an examination will show that the provisions authorizing an order of examination apply peculiarly and specifically to "companies" (i. e., corporations), *"joint stock associations"* and *"co-partnerships."* So far as applicable to the point the provisions of Section Eight are:

"Whenever any proceeding shall be commenced in any court of competent jurisdiction in the State by the Attorney General or Prosecuting Attorney, *against any corporation or corporations, individual or individuals, or association of individuals, or joint stock association or co-partnership,* under the law * * * to dissolve the same or to restrain their formation or maintenance in this State, or to recover the penalties in this Act provided, then and in such case, if the Attorney General or Prosecuting Attorney desires to take the testimony of any officer, director, agent or employe of any *company or joint stock association* proceeded against, or in case of a *co-partnership,* of any of the members of said partnership or any employe thereof."

Section Nine, in the provision for default judgment, applies to "said *corporation, joint stock association or partnership"* which has failed to produce the witnesses as demanded.

It seems, therefore, that Sections Eight and Nine are identical in respect to the parties amenable thereto. Section Eight authorizes the order of examination as against any *company, joint stock association or partnership;* and Section Nine provides for default judgment against *"said corporation, joint stock association or partnership."*

Hence, except in so far as natural persons are embraced in the word "partnership," they are not included in either Section, in those provisions relating to the order of examination and its enforcement; or, if they are included in the one, they are, also, in the other.

The conclusion that Section Eight embraces natural persons, while Section Nine does not, is not borne out by the language employed in the Act; and, on the face of the statute, there is certainly no discrimination. Corporations, joint stock associations and partnerships are all included and treated alike.

But it may be contended that, as to natural persons, embraced within the term "partnerships," the provisions of Section Nine would be invalid, and that to subject corporations to them would be to discriminate against them.

As hereinbefore pointed out, the Supreme Court of Arkansas, in *Lancashire Ins. Co.*, 66 *Ark.*, 466, intimated that Section One of the Act of 1899 (which does not differ from the Act of 1905 in any particulars which are material to the point under consideration) could not be construed so as to punish natural persons for doing business in the State while members of a trust elsewhere, etc. If that be the proper construction of this Act—and that is the utmost the plaintiff in error can claim—the effect is to eliminate natural persons from it throughout; and the provisions of Sections Eight and Nine applicable to them would otherwise be eliminated.

We would then have an Act, which, while upon proper construction by the Arkansas courts is held invalid as to natural persons, nevertheless, by the decision of the highest court of the State of Arkansas is held valid as to corporations, as a statute of regulation.

Hartford Ins. Co. vs. State, 76 *Ark.*, 303.
Hammond Packing Co. vs. State, 81 *Ark.*, 519.

That is to say, the highest court of the State of Arkansas has held the Act not to be avoided *in toto* by reason of the invalidity of certain of its provisions.

It follows, then, that, under the rule hereinbefore noticed, announced by this court in *National Cotton Oil Co. vs. Texas*, 197 *U. S.*, 115, the fact that the provisions as to natural persons may be void, does not render the enforcement of the remainder of the Act an illegal discrimination against corporations; and the only question is whether, in themselves, the remaining sections of the Act, when thus limited by construction, involve any inequality or discrimination.

If the provisions of Section Nine, in so far as they may be said to embrace individuals at all, are not operative, the parties left amenable to it are corporations and joint stock associations. It will be observed that there is no distinction made between foreign and domestic corporations, neither class being named specifically.

We therefore submit that giving Section Nine of the Act the construction assumed by plaintiff in error —that it is invalid as to natural persons—it does not violate the equality clause of the 14th Amendment.

But, let us suppose that the provisions of Section Eight are applicable to natural persons, while those of Section Nine are not. Does it necessarily follow that, corporations being included in both sections and natural persons in the Eighth alone, the Nine Section

is void as a discrimination against corporations and as between them and natural persons?

Corporations derive their rights to exist and to contract from the State; and, as before shown, they hold these rights subject to a reserved power of the State to amend, revoke or repeal their powers or any of them. Individuals have an inherent right to contract, subject only to the police powers of the State. It needs no argument, therefore, to demonstrate that questions as to the power of the State to regulate corporations can not find an answer in its rights as to individuals; and, even if the statute be invalid as to natural persons, it may be perfectly valid as to corporations. In a case where a statute is in terms applicable to both corporations and individuals, and where the provisions as to natural persons are invalid, the question arises whether the Act is so far separable as to leave the remaining provisions as to corporations still effective. This is a question of construction for the State courts; and where, as here, the highest court of the State holds that the Act is nevertheless valid as to corporations, such decision is conclusive as a declaration that the legislative intent was that the Act should apply to corporations, whether valid as to individuals or not.

The remaining question, then, is whether an Act like the one under consideration, applicable to corporations alone, makes any such unreasonable and arbitrary classification as to be void under the equality provisions of the 14th Amendment. We think that one of the latest decisions of this court settles the point; and we will not attempt any extended citation of cases.

In *Consolidated Rendering Co. vs. Vermont* (*Mss. Op.*), hereinbefore cited, it was held that an Act of Vermont under which corporations, alone, may be compelled to produce books and papers before a grand jury or other tribunal, did not discriminate against it, because there was no such obligation imposed upon natural persons.

Assuming the invalidity of the provisions of Section Nine of the Act here under consideration, in so far as they apply to natural persons, and that the effect of the decisions of the highest court of the State of Arkansas is that, while invalid as to natural persons, the provisions of the Act are valid as to corporations, because of their separability, this decision is very much in point in the case at bar. To all intents and purposes the Act of 1905 here under consideration is like the Act of Vermont in that case—one applicable to corporations alone.

In discussing the objection that the Act of Vermont discriminated against corporations and denied them the equal protection of the law, because it was applicable to corporations alone, Mr. Justice Peckham says:

"Lastly, the objection is urged that there is an arbitrary classification in the statute, which is confined to corporations alone, and the company is thereby deprived of the equal protection of the laws secured by the 14th Amendment. There is no improper classification in this regard. It is stated by the State court that, prior to the passage of this Act, there was no adequate provision for compelling the production of books and papers by a corporation, and it was held that the statute was designed for requiring the corporation itself, as the responsible owner and custodian, to produce the documentary evidence mentioned therein, without the necessity of calling upon bookkeepers, managers and other servants who may or may not, in fact, have custody or control thereof at the time the notice to produce is given, and to place upon the corporation the responsibility of seeing that such evidence called for, if in its control, is produced. There is ample justification for the classification made by the statute."

The objection specified in the assignment of error under consideration was not pressed or presented in the form here adopted at the hearing in the Supreme Court of Arkansas. Hence it is not specifically discussed in the opinion in this cause below. But the court did hold that the section under consideration was valid, and that it did not deny either the due pro-

cess of law or the equal protection of the laws, as guaranteed by the 14th Amendment. Since there is no specific decision upon the point here presented, we can not, as does Mr. Justice Peckham in the Vermont case, state precisely the reasoning upon which the court below proceeded in arriving at its conclusions. But it is equally as true in this case as in that one, that "prior to the passage of the Act, there was no adequate provision for compelling the production of books and papers by a corporation." And it is equally as true in Arkansas as in Vermont that, prior to the passage of the Act, there did exist a great inequality in the effectiveness and operation of the general provisions of the law, relating to the production of evidence, as between corporations and natural persons; and that the advantage was all on the side of the corporation. The Act of 1905, like the Act of Vermont (as stated in the opinion of the Supreme Court of Vermont in that case, 66 Atl., 790), was designed to equalize this difference. The State of Vermont did this by an Act directed solely at corporations, omitting all mention of natural persons; the State of Arkansas, by the Act of 1905, attempted to do this more explicitly by mentioning corporations and natural persons, throughout, and making its provisions applicable to both. This was unnecessary; and, if, indeed, the

provisions as to natural persons are invalid, the Act of 1905 is left in the same category as the Act of Vermont—an Act applicable to corporations alone. That, as such, it was a valid classification, appropriate to the subject matter and purpose of the Act, is clear from the language of Mr. Justice Peckham in the Vermont case.

We therefore submit that the Ninth Section of the Act of 1905 is not invalid upon the grounds alleged in the sixth assignment.

This brings us to the consideration of the twelfth assignment of error. It is therein alleged that Section Nine and the judgment rendered thereunder are violative of the equality clause of the 14th Amendment, "since the Act did not provide for the rendition of such a judgment against the plaintiff and in favor of the defendant under similar circumstances, or for the rendition of a judgment against a natural person, where defendant, in a like state of case."

The latter objection has just been discussed. The other—that there is no provision for a default judgment against the State for refusal to produce evidence—is similar to the objection taken to the Eighth Section in the tenth assignment of error. We respectfully refer the court to what we have hereinbefore said in that connection.

As we there pointed out, in connection with the claim that the statute should have made provision for an order of examination as against the State, at the instance of the defendant, the State has not and, in the very nature of things, can not have any information peculiarly within its knowledge bearing upon the business relations of the defendant and other corporations. There exists no conceivable ground for such a provision. And, indeed, as previously pointed out, the whole purpose of the enactment seems to have been to equalize the parties before the law, by taking from the defendant its power, by virtue of its corporate form, to conceal and withhold evidence by keeping its books and officers outside the State.

All that we have said in connection with this argument against Section Eight applies with equal force here. If there was no necessity to provide for an order of examination directed to the State, at the instance of the corporation, there was none for a provision in Section Nine providing for a default judgment against the State for disobeying such order.

We do not think that learned counsel will seriously press this argument; so we submit it upon its own intrinsic absurdity.

The remaining assignments of error, as previously shown, are mere general statements that Section Nine

is violative of the equality provisions of the 14th Amendment; and they find an answer in what has been said in reply to the sixth and twelfth assignments.

This disposes of all the assignments directed to Section Nine; and we respectfully submit that it stands all the tests of both due process of law and equal protection of the law.

V.

THE VALIDITY OF SECTIONS EIGHT AND NINE OF THE ACT OF 1905, CONSTRUED TOGETHER.

Two of the assignments of error are directed to the validity of both these sections, when construed together. The thirteenth assignment alleges that the order of examination wrongfully called upon the plaintiff in error to produce evidence against itself in a penal action; and that therefore the subsequent action of the court in rendering judgment against it for disobedience by such order was violative of the due process clause of the 14th Amendment.

And the fourteenth assignment alleges that, for the same reasons, the action of the court in so rendering

judgment against plaintiff in error was violative of the equality clause of the 14th Amendment, "since the Act did not provide for the rendition of such a judgment against the plaintiff upon motion of the defendant in such a cause, or for the rendition of such a judgment against a natural person, for violation of such an order under similar circumstances."

We have already discussed the proposition of the right of the defendant to be afforded the same procedure and remedies against the State as the State is given against the defendant. And we have also discussed the proposition that corporations can not be subjected to any burdens not laid upon natural persons. Sufficient has been said upon these propositions; and we refer the court to these arguments made in preceding sections of this brief.

But, as we understand them, the real theory upon which these two assignments proceed is that the due process and equality provisions of the 14th Amendment include within their guaranties the principle that no one shall, in a penal action, be compelled to give evidence against himself.

The only provision of the Constitution of the United States which relates to this point is that of the 5th Amendment, which reads:

"Nor shall (any person) be compelled, in any *criminal case* to be a witness against himself."

This provision was designed solely and peculiarly as a limitation upon Federal, and not State, action.

9 *Fed. Stat. Ann.*, 256, *and many cases cited in notes.*

The right of one charged with a capital or infamous crime to be held to answer therefor only upon presentment or indictment by a grand jury is one guaranteed equally and in the same connection with that of not being compelled to be a witness against one's self in a criminal proceeding. Yet it has often been held, as said in *Beavers vs. Henkle*, 194 *U. S.*, 84, that the States, in the exercise of their undoubted sovereignty, possess the power to provide, and have often provided, for the trial of criminal offenses upon information filed by the prosecuting officer, and without any previous inquiry or action by the grand jury.

See also:

Hurtado vs. California, 110 *U. S.*, 516.

If the argument is tenable that the 14th Amendment extends, as limitations upon the powers of the States, the provisions of those amendments which, like the 5th, were designed solely as limitations upon the

powers of Congress and the Federal Government, then the right of presentment or indictment by a grand jury would have become a limitation upon the States. To hold that one right guaranteed by the 5th and its accompanying amendment is thus extended, is to hold that all are equally so. Such a theory would involve the overruling of a vast body of decisions of this court; and, indeed, is contrary of the fundamental idea and purpose of the amendments in question.

This court in the case of *Consolidated Rendering Co. vs. Vermont, Mss. Op.*, had the same contention presented to it as is made under these assignments here; but it was found unnecessary to decide it specifically. It was contended that a statute of Vermont which required a corporation to produce books and papers before a grand jury was violative of this guaranty against self accusation as contained in the 5th Amedment, and that the 14th Amendment, by its privilege and immunity, due process and equality phrases, extended the guaranty as against State action. The court refused to decide the point specifically, because it did not appear that, in fact, the defendant had been compelled to testify against himself.

For the same reason, it is unnecessary to decide the question in this case.

The record shows simply that the Attorney General called for the production of certain witnesses and documents before a commissioner. Whether or not the evidence of these witnesses and documents would incriminate the corporation or the witnesses themselves was never brought before the court. The company absolutely refused to produce them. Not a single question was ever asked of a witness in this case. It was, therefore, impossible for the court, or even the company itself, to know what questions would have been asked, and whether they would have been incriminatory, granting that the company had the right to refuse to produce evidence which might criminate it or subject it to a penalty. If the plaintiff in error had produced the persons and papers named and described in the order, and the questions addressed to the witnesses or the documents demanded from time to time had demonstrated the evidence as elicited therefrom would be such as the company had the right to withhold under privilege, the question would have been properly presented as to whether or not it was entitled to the protection of the 5th Amendment. But, instead, it has elected to refuse to produce any evidence, competent or incompetent, criminating or otherwise; and it can not object that it feared that the evidence elicited might, in all probability, criminate it,

or show its liability to the penalities of the Act of 1905.

In the Vermont case, above referred to, the corporation, when ordered to produce certain papers before the grand jury, refused, upon the ground that they would tend to incriminate it. The Supreme Court of Vermont, in a very able opinion (66 *Atl.*, 790, 794), discuss and overrule this contention. The decision proceeds upon the theory that when evidence is called for by proper process it must be produced, in order that the court may judge its competency and decide whether or not it is privileged. And that the question as to whether it is within privilege of the witness to refuse to answer questions is one for the court and not for the witness himself. This court approved and adopted this decision and reasoning of the Vermont court.

In discussing the objection that the evidence tended to criminate the company, Mr. Justice Peckham says:

"The fifth objection is also without merit, even upon the assumption that in such a case as this the company could take the objection through the witness. The court simply held that it could not determine whether the objection as to incrimination was valid until the books were produced for inspection by the court, though before they were to be used in evidence. If, after that inspection, any portion were found to be

of that character, the court held that such portion would be excluded. As, however, the company failed and refused absolutely to produce the books, with some unimportant exceptions, it was adjudged to have failed to show any reasonable cause for such refusal to comply with the requirements of the notice, and it was fined for contempt. *Obviously the company could not by its refusal to produce the books thereby entirely conclude the court from any examination whatever into the sufficiency of the excuse for such non-production. Otherwise the company could disobey at its pleasure and so prevent any inquiry into the merits of the excuses. The statute might as well not exist if this were to be permitted.''*

So, in this case, the company can not, by absolutely refusing to produce the witnesses and documentary evidence, entirely conclude the court from any inquiry into the sufficiency or correctness of its plea of privilege.

We respectfully submit that the question of privilege is not raised in any proper manner by the record in this case; and that, therefore, the right of the plaintiff in error to claim it is not before the court.

We have, thus far, discussed this question without disputing that the plaintiff in error is correct in assuming that it, a corporation, had the same rights as are guaranteed to the citizen or natural person. We have assumed with them that, if a natural person could claim the privilege, this corporation could. But

we deny the correctness of this assumption. We now assert that the State has certain powers of visitation over its corporate creatures and licensees, which authorize it to demand of them a full disclosure, at any time, of the manner in which they are exercising their charter powers. Corporations exist only by grant from the State. They possess certain powers and attributes not given to natural persons, and they are subjected in a correspondingly greater degree to State control. Like the steward of the vineyard, they may at any time be called upon to render an account of their stewardship.

This visitorial power of the State is emphatically recognized in *Hale vs. Henkle*, 201 *U. S.*, 43. In that case, Mr. Justice Brown, at page 74, in contrasting the privilege of a person as a witness and that which might be asserted by a corporation, says:

"Conceding that the witness was an officer of the corporation under investigation, and that he was entitled to assert the rights of the corporation with respect to the production of books and papers, *we are of the opinion that there is a clear distinction in this particular between an individual and a corporation, and that the latter has no right to refuse to submit its books and papers for an examination at the suit of the State.*

"The individual may stand upon his constitutional rights as a citizen. He is entitled to carry on

his private business in his own way. His power to contract is unlimited. He owes no duty to the State or to his neighbors to divulge his business, or to open his doors to an investigation, so far as it may tend to criminate him.

"He owes no such duty to the State, since he receives nothing therefrom, beyond the protection of his life and property. His rights are such as existed by the law of the land, long antecedent to the organization of the State, and can only be taken from him by due process of law and in accordance with the Constitution. Among his rights are a refusal to incriminate himself, and the immunity of himself and his property from arrest or seizure except under a warrant of the law. He owes nothing to the public, so long as he does not trespass upon their rights.

"Upon the other hand, the corporation is a creature of the State. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the State and limitations of its charter. Its powers are limited by law. It can make no contract not authorized by its charter. Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation. There is a reserved right in the legislature to investigate its contracts and find out wheher it has exceeded its powers.

"It would be a strange anomaly to hold that a State, having chartered a corporation to make use of certain franchises, could not, in the exercise of its sovereignty, inquire how these franchises had been employed, and whether they had been abused, and demand the production of the corporate books and papers for that purpose.

"The defense amounts to this: That an officer of a corporation, which is charged with a criminal violation of the statute, may plead the criminality of

the corporation as a refusal to produce its books. To state this proposition is to answer it. *While an individual may lawfully refuse to answer incriminating questions, unless protected by an immunity statute, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand, when charged with an abuse of such privileges.*"

And this visitorial power of the State is recognized in the very able concurring opinion of Mr. Justice Brewer in that case. He takes the position that a corporation is not embraced within the language of the 4th Amendment at all; and following up that line of reasoning, says, at page 78:

"If a contrary view obtains, the power of the government, by its representatives, to look into the books, records and papers of a corporation of its own creation, to ascertain whether that corporation has obeyed or is defying the law, will be greatly curtailed, if not destroyed."

That this reserved visitorial power of the State is ample warrant for the enactment of a law which requires the corporation to produce its officers, agents and books on request of the properly designated agency of the State, the Missouri case of *State vs. Standard Oil Co. of Indiana*, 92 *S. W.*, 1062, is directly in point.

That was a case wherein the Attorney General, proceeding under an Act identical in many respects

with the Act of 1905 here under consideration, and under a section of said Act similar to Section Eight of the Act of 1905, asked for, and obtained, an order requiring a defendant company to produce its officers and books at a certain place and time for the purpose of giving testimony. The question of the validity of this order came before the court for its examination. The court, at page 1069, through Lamm, Justice, say:

"Yet we feel at least on solid ground on the proposition that statutes leveled against monopolies are buttressed upon the wisdom of the common law; and this court, constrained and enlightened by events of current history, is not required, and does not deem itself invited, to approach the interpretation of such statutes with a hostile or sour predisposition to drive a coach and six through them, but, on the other hand, while sedulously protecting the rights and liberties of the individual from insidious approaches under whatever artful guise, we should at the same time not lose sight of the commnuity, and should endeavor to advance the beneficent purpose underlying such laws (*State vs. Armour Packing Company*, 173 *Mo.*, 356; 73 *S. W.*, 645), where it can be done without doing violence to constitutional provisions; and in our opinion, no constitutional provision is impinged upon by the law providing for such notice, nor by the notice itself, so far as it relates to the means employed in procuring the attendance of witnesses. In arriving at this conclusion we are somewhat influenced by several other propositions. For example, *while for certain purposes a corporation is deemed a person, and entitled to the benefits of any law regulating the rights of a person, yet this is only sub modo, because*

for other purposes such artificial entity occupies a peculiar position of the law. Thus, unlike a natural person, it may not go into another State and transact business without the permission or against the will of such State. (105 *U. S.*, 652; 172 *U. S.*, 566; 136 *Mo.*, 382.)

"It logically results from this recognized doctrine that a State may withhold or regulate and grant license to do business under legislative restrictions, not inimical to Federal prerogative relating to interstate commerce or other high Federal governmental functions. *It is but taking one step further in the evolution of the argument to hold, as de do, that when a corporation, having no right to come into a State other than that of its own creation, for business purposes, except by virtue of its license and the expressed will of the State so invaded, does come into such State under a license, as in this case, a contract to obey existing laws pertaining to the granting of that license and the right to hold under that license is implied. In this view, the law must be read into the license, and in this view it is not going too far to hold that, when the Republic Oil Company of New York was granted and accepted a license to do business in Missouri, it agreed and contracted with this State that notice to appear and testify in any suit affecting that license or the right to do business thereunder, served upon its attorney of record in that case, should be deemed and taken as due notice to the corporation. This is well within the reasoning of Daggs vs. Ins. Co.*, 136 *Mo.*, 398. *Nor does it seem to be laying an unfair burden upon such corporation to require it to produce its specified officers and agents at a reasonable time and suitable place within this State to give their testimony in such case.*"

Proceeding, as a reason for this conclusion, the learned justice thus states the proposition of the visitorial power of the State:

"And this is so because a corporation by virtue of its infirmity as an artificial person can testify in court, or otherwise speak or act, only through officers or agents in ordinary transactions in matters incident to its business affairs. Like the man of authority who had soldiers under him, it says to one of these agents or officers, 'Go,' and he goeth; to another, 'Come,' and he cometh; and to this servant, 'Do this,' and he doeth it. By virtue of such command its officers and agents fetch and carry. They come into a State and establish a business and thereafter shape and control it. *If, then, the voice of its overlord, its real, paramount master, which master it must not be forgotten is the law itself, requests of it the presence of one or more of its officers or agents for the solemn and just purposes of the law, it can not be said, as a matter of a priori reasoning, that it is at liberty to refuse to do for the law what it is constantly doing for itself, sua sponte, to-wit: send such officers or agents within the jurisdiction of the courts of this State.*"

The great principle which underlies this visitorial power is that corporations, being creatures of the State, are not within the full protection of those constitutional provisions which are designed to protect and preserve the rights of natural persons from governmental encroachments. Whatever powers or rights a corporation has must flow from its contract with the State; while natural persons possess whatever rights are not prohibited to them by law. The cor-

poration is the creature of the law, while the individual is its ward. Hence the right of the State to control the two classes rests upon entirely different principles. The police power of the State—that power which, based upon the principle of the greatest good to the greatest number, so controls the acts of the individual that he may so use his own as not to injure others—is the measure of the control the State has over natural persons; while the power to control and regulate its own creatures rests both upon contract. Certain of these rights of the individual are guaranteed by the Constitution, so that they may never be denied by the State; but these guaranties have special reference to natural persons, and in their nature do not appertain to corporations.

This principle is clearly recognized by Mr. Justice Harlan, in his concurring opinion, in *Hale vs. Henkle, supra.* He says, at page 78:

"It seems to me that the witness was not entitled to assert, as a reason for not obeying the order of the court, that the subpoena *duces tecum* was an infringement of the 4th Amendment, which declares that 'the right of the PEOPLE to be secure in their PERSONS, houses, papers and effects shall not be violated.' * * *

"In my opinion, a corporation—'an artificial being, invisible, intangible and existing only in contemplation of the law'—can not claim the immunity given by the 4th Amendment; for it is not a part of the

PEOPLE within the meaning of that Amendment. Nor it is embraced within the word 'persons' in the amendment."

The 5th Amendment, which is the one containing the guaranty against self crimination, and which is said, in *Boyd vs. United States,* 116 *U. S.,* 616, to be the complement of the 4th Amendment which guarantees protection against illegal searches anl seizures, was invoked in the *Hale vs. Henkle* case as much as was the 4th. And all that was said with reference to the scope and purpose of the 4th Amendment applies with equal force to the 5th. The language of the 5th Amendment is, "No *person* * * * shall be compelled in any criminal case to be a witness against himself." Applying to it the principle stated by Mr. Justice Harlan, it seems obvious that corporations are not included within its protection.

And the conclusion, that if the 4th Amendment does not include corporations the 5th does not, is strengthened by the concurring opinion of Mr. Justice McKenna in *Hale vs. Henkle.* After discussing the intimate relationship between the two amendments, he says, at page 83:

"We have been unable to perceive that the seizure of a man's private books and papers, to be used in evidence against him, is substantially different from compelling him to be a witness against himself.

(Quoted from *Boyd vs. United States*, 166 *U. S.*, 616.) *Boyd vs. United States* is still recognized, and if its reasoning remains unimpaired, and the purpose and effect of the 4th Amendment receives illumination from the 5th, or to express the idea differently, if the amendments are complements of each other, directed against the different ways by which a man's immunity from giving evidence against himself may be violated, it would seem a strong, if not an inevitable conclusion, that, if corporations have not such immunity, they can no more claim the protection of the 4th Amendment than they can of the 5th."

This fundamental distinction between the constitutional rights of natural persons and corporations is further supported by the very clear and logical opinion in *State vs. Brown & Sharp Mfg. Co.* (*R. I.*), 17 *L. R. A.*, 859. In that case the court say:

"In regard to so much of the defendant's contention as is based upon Amendment 14 of the Constitution of the United States, *we are of the opinion that that constitutional provision has no application to corporations. To be entitled to its protection, the defendant must be either a citizen of the United States, or a person, in the sense in which that term is used in section one of that Amendment.* We approve of the reasoning and conclusion of Mr. Justice Woods in *The Insurance Co. vs. New Orleans*, 1 *Woods*, 85, wherein he decides that an incorporated company is neither a citizen of the United States, nor a person, within the meaning of the first section of the 14th Amendment, and therefore can not be embraced within its provisions. In that case the learned judge said: 'The complainant, to be entitled to the protection of this constitutional provision, must be either a citizen of the United States, or a person, in the sense in which

that term is used in this section. It has been repeatedly held by the Supreme Court of the United States that corporations were not citizens of the several States in such sense as to bring them within the protection of that clause in the Constitution of the United States (*Sec.* 2, *Art.* 4) which declares that 'the citizens of each State shall be entitled to all the privileges and immunities of the several States.' *Bank of Augusta vs. Earle*, 38 *U. S.*; 13 *Pet.*, 586; 10 *L. Ed.*, 306; *Paul vs. Virginia*, 75 *U. S.*; 8 *Wall.* 177; 19 *L. Ed.*, 359. Who are citizens of the United States, within the meaning of the 14th Amendment, we think is clearly settled by the terms of the amendment itself: 'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.' No words could make it clearer that citizens of the United States, within the meaning of this article, must be natural, and not artificial, persons, for a corporation cannot be said to be born, nor can it be naturalized. I am clear, therefore, that a corporate body is not a citizen of the United States, as that term is used in the 14th Amendment. Are corporations persons, within the meaning of the same amendment? The word 'person' occurs three times in the first section, in the following connections: 'All persons born or naturalized in the United States;' 'nor shall any State deprive any person of life, liberty or property,' etc.; 'nor shall any State deny to any person within its jurisdiction the equal protection of the laws.' The complainants claim that this last clause applies to corporations—artificial persons. Only natural persons can be deprived of life or liberty; so that it is clear that artificial persons are excluded from the provisions of the first two clauses just quoted. If we adopt the construction claimed by the complainants, we must hold that the word 'person,' where it occurs the third time in this section, has a wider and

more comprehensive meaning than in the other clauses of the section where it occurs. This would be a construction for which we find no warrant in the rules of interpretation. The plain and evident meaning of the section is that persons to whom the equal protection of the law is secured are persons born or naturalized, or endowed with life and liberty, and consequently natural, and not artificial persons. This construction of the section is strengthened by the history of the submission by Congress, and the adoption by the States of the 14th Amendment, so fresh in all minds as to need no rehearsal.' "

The reasoning of this case seems to us unimpeachable; and it finds strong support in the views of Mr. Justice Harlan in *Hale vs. Henkle.* This visitorial powers of the State, as recognized in that case and in the Missouri case cited, coupled with the principle as stated by Mr. Justice Harlan in *Hale vs. Henkle,* and by the Rhode Island court, that the constitutional guaranties, such as that against self-crimination, apply to natural persons rather than to corporations, constitute, in themselves, a conclusive answer to the contention of plaintiff in error that Sections Eeight and Nine are unconstitutional because they involve a requirement of self-crimination.

We, therefore, submit upon this branch of the case:

1. *That the provisions of the 5th Amendment are not extended to the States by the 14th Amend-*

ment, so as to make the Federal Constitution prohibit the enactment of any law by a State which might require self-crimination.

2. *That the question as to whether the Act of* 1905, *or the order of examination made thereunder, did require the plaintiff in error to be a witness against itself in a criminal proceeding, is not before the court upon the record in this case; and that it is therefore unnecesary to decide the preceding question.*

3. *That the State, in the exercise of its visitorial powers over corporations, had the right to enact the statute in question; and that corporations are not within the protection of the guaranty against self-crimination.*

This brings us to the consideration of the last of the assignments of error.

VI.

THE VALIDITY OF SECTIONS ONE, TWO, EIGHT AND NINE, CONSTRUED TOGETHER.

The nineteenth assignment of error asserts:

"That the Supreme Court of Arkansas erred in holding valid the judgment rendered upon a complaint seeking to recover a penalty, imposed by an Arkansas statute, for acts of the plaintiff in error not done

within the State of Arkansas nor affecting business therein, and in holding that such judgment did not deprive it of its property without due process of law, or deny it the equal protection of the law, in violation of the 14th Amendment."

In so far as this assignment aserts the invalidity of the judgment, as a punishment for acts done outside the State, it is an attack upon Sections One and Two; and we have heretofore answered it by showing that the act penalized by the statute is the doing of business in Arkansas while a member of an illegal combination—an act done within the State of Arkansas.

In so far as the assignment of error asserts that the default judgment denied to it the equal protection of the laws or the due process of law, it is an attack upon Sections Eight and Nine; and we feel that we have already answered the objections We, therefore, respectfully refer the court to those portions of this brief where these propositions are discussed.

CONCLUSION.

We have, we think, answered all the assignments of error, and shown that they are not wel taken.

Counsel for the plaintiff in error having elected to furnish their brief at the latest day permitted under the rules of this court, we have been under the necessity

of anticipating their arguments and answering them without ever having seen them.

We trust that we have covered the case and answered all the arguments of counsel; but, if not, we deem it but just that the court know the reason.

We respectfully submit that the judgment of the Supreme Court of Arkansas in this case should be affirmed.

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HAMMOND PACKING COMPANY *v.* STATE OF ARKANSAS.

ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

No. 54. Argued February 24, 25, 1908.—Decided February 23, 1909.

The right of a State to prevent foreign corporations from continuing to do business within its borders, is the correlative of its right to exclude them therefrom; and, as this power is plenary, the State, so long as no contract is impaired, may exert it from consideration of acts done in another jurisdiction.

If the power exists to revoke a permit, the question of motive is immaterial for the purpose of determining the constitutionality of the legislative action exerting the power.

The difference between the extent of the power which the State may exert over the doing of business within its borders by an individual, and that which it can exercise as to corporations, furnishes a distinction authorizing a classification between the two which does not violate the equal protection clause of the Fourteenth Amendment.

Where, as in this case, penal provisions as to individuals are separable, and the state court has so construed the statute, any lack of constitutional authority to enact the statute as to individuals would not render the statute unconstitutional as to corporations.

The chartered right of a corporation to do business does not operate to deprive the State of its police power, and the franchise to do business is qualified by the duty to do so conformably to lawful and proper police regulations thereafter enacted.

The claim of an irrepealable contract cannot be predicated upon a contract which is repealable; and, where the reserved power to repeal, alter and amend charters is only to be exercised without injustice, it is within the province of the state court to determine whether it has been so exercised, and its decision cannot be reviewed by this court unless a contract has been impaired or some other and fundamental right within the protection of the Federal Constitution has been denied.

Where the state court has decided that the penal provisions of a statute relate to both domestic and foreign corporations, a foreign corporation cannot claim that the contract between it and the State admitting it, on payment of the franchise tax, to do business on the same

terms as a domestic corporation has been impaired by the revocation of its permit for violation of such statute. *Am. Smelting Co. v. Colorado*, 204 U. S. 403, distinguished.

A state statute requiring corporations to produce books and papers which has been construed by the highest court of the State to the effect that its requirements are satisfied by a *bona fide* effort to comply with its provisions or a reasonable showing of inability to comply therewith is not an arbitrary and unjust exercise of authority repugnant to the due process clause of the Fourteenth Amendment, and so held as to such provisions in the Arkansas Anti-Trust Law.

Relief cannot be afforded by this court to one who violates the provisions of a state statute from an erroneous conception of what the statute requires.

Under the visitorial powers of a State over corporations doing business within its borders it is competent for it to compel such corporations to produce their books and papers for investigation and to require the testimony of their officers and employés to ascertain whether its laws have been complied with, and this power extends to the production of books and papers kept outside of the State, and a statute requiring such production does not amount to an unreasonable search or seizure or a denial of due process of law. *Consolidated Rendering Co.* v. *Vermont*, 207 U. S. 541.

Quære and not decided whether the due process clause of the Fourteenth Amendment embraces in its general terms a prohibition of unreasonable searches or seizures.

An order made pursuant to statute in a suit for penalties for violations of a state anti-trust law requiring a corporation to produce books and papers does not deny due process of law because thereunder the State may elicit proof not only as to the liability of the corporation but also proof in its possession relevant to its defense. *Consolidated Rendering Co.* v. *Vermont*, 207 U. S. 541; *Hale* v. *Henkel*, 201 U. S. 43.

If a state statute requiring the production of papers is constitutional the motive of the State for acting thereunder is immaterial.

Statutory regulations dealing exclusively with persons or property not within the borders of the State, if otherwise valid, are not unconstitutional as denying equal protection of the law. *Central Loan & Trust Co.* v. *Campbell*, 173 U. S. 84.

The wider scope of the power of the State over corporations than over individuals affords a basis for separate classification as to the production of books and papers.

A state statute requiring corporations to produce, and creating a presumption of fact as to bad faith and untruth of a defense by reason

of suppression of material evidence, does not deny due process of law; nor does an order of the court based on such a statute striking out the answer of a defendant corporation which has refused to produce material evidence deny due process and condemn him unheard. *Hovey* v. *Elliott*, 167 U. S. 409, in which the order striking the answer from the files was in the nature of a punishment for contempt, distinguished.

81 Arkansas, 519, affirmed.

THE facts, which involve the constitutionality of certain provisions of the anti-trust statute of the State of Arkansas and the validity of proceedings in the courts of the State thereunder, are stated in the opinion.

Mr. John G. Johnson and *Mr. W. E. Hemingway*, with whom *Mr. George B. Rose* and *Mr. Ralph Crews* were on the brief, for plaintiff in error:

Section 1 of the act in question, as construed by the Supreme Court of the State of Arkansas, impairs the obligation of the contract between the defendant as a foreign corporation, and the State, whereby the defendant was permitted to do business within the State; and is therefore violative of § 10, Art. I of the Constitution of the United States. *American Smelting & Refining Co.* v. *Colorado*, 204 U. S. 103; Concurring opinion of Mr. Justice Wood, 100 S. W. Rep. 1099; *Hartford Ins. Co.* v. *State*, 89 S. W. Rep. 42; § 11, art. 12, constitution of Arkansas; §§ 824, 825, 826, 827 and 828, Kirby's Digest Statutes of Arkansas; 15 A. & E. Ency. Law (2d ed.), p. 1049; *Commonwealth* v. *Proprietors of New Bedford Bridge*, 2 Gray, 339; *Washington Bridge Co.* v. *State*, 18 Connecticut, 53; *N. M. Co.* v. *Coon*, 6 Pa. St. 379; *State Tax on Foreign Held Bonds*, 15 Wall. 320; *Gordon* v. *Appeal Tax Court*, 3 How. 133; *Wendover* v. *Lexington*, 15 B. Monroe, 258; *Attorney General* v. *Bank of Charlotte*, 4 Jones Equity (N. C.), 293; *Miller* v. *State*, 15 Wall. 497; *Coast Line R. R. Co.* v. *Savannah*, 30 Fed. Rep. 646; *Erie R. R.* v. *Pennsylvania*, 153 U. S. 628; *C., R. I. & P. Ry. Co.* v. *Ludwig, Secy. of State*, 156 Fed. Rep. 152; *Commonwealth* v. *M. & O. R. R. Co.*, 64 S. W. Rep. 452; *Seaboard Air Line R. R. Co.* v.

R. R. Com. of Alabama, 155 Fed. Rep. 792; *British Am. Mtg. Co.* v. *Jones*, 56 S. E. Rep. 983.

Section 1 of the act in question legislates relating to transactions occurring beyond the limits of the State of Arkansas, and is therefore extra-territorial, and its enforcement would constitute a taking of the property of defendant without due process of law, and constitute a denial to it of the equal protection of the law, contrary to the terms of the Fourteenth Amendment. *Casey* v. *State*, 53 Arkansas, 334; Cooley's Const. Lim. 176; *People* v. *Butler St. Foundry Co.*, 201 Illinois, 236; *Chicago Wall Paper Mills* v. *General Paper Co.*, 147 Fed. Rep. 491; *Cargyle Co.* v. *Minnesota*, 182 U. S. 452; *Carroll* v. *Greenwich Ins. Co.*, 199 U. S. 409; *Santa Clara Co.* v. *So. Pac. Ry.*, 118 U. S. 394; *Charlotte &c. Ry. Co.* v. *Gibbs*, 142 U. S. 386; *Covington &c. Co.* v. *Stanford*, 164 U. S. 578; *Mo. Pac. Ry.* v. *Mackey*, 127 U. S. 209; *N. Y. Life Ins. Co.* v. *Smith*, 41 S. W. Rep. 687; *Baltimore &c. Ry.* v. *Read*, 62 N. E. Rep. 488.

So much of § 8 of the act as purports to authorize the court to make an order for the production of witnesses, books and papers, is unconstitutional and void, and did not warrant the making of an order in pursuance of its provisions.

It subjects the defendant to unreasonable search and seizure of its books, papers and documents, and thereby violates the Fourth and Fourteenth Amendments to the Constitution of the United States.

It calls upon the defendant to produce evidence to be used against itself in a penal action, and thereby violates the Fifth and Fourteenth Amendments to the Constitution of the United States.

It denies to the defendant the equal protection of the law, and constitutes a taking of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States. *Boyd* v. *United States*, 116 U. S. 617; *Monongahela &c. Co.* v. *United States*, 148 U. S. 325; *Interstate Commerce Com.* v. *Brimson*, 154 U. S. 447, 479; *Hale* v. *Henkel*, 201 U. S. 43; *Logan* v. *Pa. Ry. Co.*, 132 Pa. St. 403;

Cooley's Const. Lim. 368 *et seq.*; *Lester* v. *People*, 150 Illinois, 408; *Rothwill* v. *Bank*, 20 Hun, 517; *Commonwealth* v. *Lottery Tickets*, 5 Cush. 369; *Sanford* v. *Nichols*, 13 Massachusetts, 286; *Lee* v. *Angas*, L. R. 2 Eq. 39; *Ex parte Brown*, 72 Missouri, 83; *Tharp* v. *Paige*, 66 Arkansas, 229; *State* v. *Slamon*, 73 Vermont, 212; *People* v. *Western Ins. Co.*, 40 Ill. App. 428; *Boyle* v. *Schmidtland*, 146 Pa. St. 255; *Gunn* v. *Railway*, 50 N. E Rep. 132; *Gulf &c. Railway* v. *Ellis*, 165 U. S. 150; *Mo. Pac. Ry.* v. *Mackey*, 127 U. S. 209; *Central &c.* v. *Board of Trade*, 125 Fed. Rep. 468; 3 Wigmore on Evidence, § 2259; *State* v. *Simmons Hardware Co.*, 18 S. W. Rep. (Mo.) 1125; Cooley's Const. Lim. 370; *Counselman* v. *Hitchcock*, 142 U. S. 547; *Brown* v. *Walker*, 161 U. S. 591.

When the State goes into the courts for the assertion of its rights it goes upon an equality with other litigants. *State* v. *Morgan*, 52 Arkansas, 150; *Brent* v. *Bank*, 10 Pet. 596; *The Siren*, 7 Wall. 159; *United States* v. *Beebe*, 17 Fed. Rep. 41.

So much of § 9 of the act as purports to authorize the court to strike from the files the pleadings of the defendant upon its failure to comply with the terms of the order entered pursuant to § 8, is unconstitutional and void, and the judgment so rendered constitutes a taking of the property of the defendant without due process of law, and a denial to it of the equal protection of the laws, in violation of the terms of the Fourteenth Amendment to the Constitution of the United States. *McVeigh* v. *United States*, 11 Wall, 259; *Windsor* v. *McVeigh*, 93 U. S. 274; *Hovey* v. *Elliott*, 167 U. S. 444; *Boyd* v. *United States*, 116 U. S. 617; *Orient Insurance Co.* v. *Daggs*, 172 U. S. 557; *Holden* v. *Hardy*, 169 U. S. 366; *Bradstreet* v. *Neptune Ins. Co.*, 3 Sumn. 601; *Adams* v. *Postal Telegraph Co.*, 155 U. S. 689, 698; *Galpin* v. *Page*, 18 Wall. 330; *Lasere* v. *Rochereau*, 17 Wall. 437; *Simon* v. *Croft*, 182 U. S. 427; Cooley's Const. Lim. (6th ed.) 452; *Myers* v. *Shields*, 61 Fed. Rep. 718; *Burton* v. *Platter*, 53 Fed. Rep. 901; *Zeigler* v. *R. R. Co.*, 58 Alabama, 594; *State ex rel.* v. *Billings*, 55 Minnesota, 473; *Foley* v. *Foley*, 52 Pac. Rep. 122; *Younger* v. *Superior Court*, 69 Pac. Rep. 485; *Mc-*

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v. *Superior Court*, 51 Pac. Rep. 696; *Greig* v. *Ware*, 55 p. 163; *State* v. *Clancy*, 61 Pac. Rep. 897; *Hebb* v. *County* 7 S. E. Rep. 678; *Underwood* v. *McVeigh*, 23 Grattan 09; *Fairfax* v. *Alexander*, 28 Grattan (Va.), 16; *State* v. *New Orleans*, 42 La. Ann. 92; *Re the Fred M. Lawrence*, Rep. 1017; *Altschule* v. *Doyle*, 55 California, 633; *eather* v. *Richt*, 88 Fed. Rep. 713; *Warner* v. *Godfrey*, S. 365; *Baltimore &c. Ry.* v. *Reade*, 62 N. E. Rep. 488; *n* v. *Phœnix Bank*, 85 N. Y. 437; *Grinson* v. *Edwards*, Va. 347; *Russell* v. *Grant*, 122 Missouri, 161; *State* v. *Co.*, 45 S. C. 464; *Darr, Administrator*, v. *Rohr*, 82 , 359; *Schlitz* v. *Roenitz*, 86 Wisconsin, 36; *Carroll &c.* , 32 Arkansas, 131; *Hickman* v. *Kempner*, 35 Arkansas, *te* v. *Newton*, 33 Arkansas, 276; *Little Rock &c. Ry.* v. 33 Arkansas, 816; *Smith* v. *Leach*, 44 Arkansas, 287; v. *Johnson*, 36 Arkansas, 406.

Lewis Rhoton and *Mr. James H. Stevenson*, with whom *Guy Fulk*, *Mr. W. F. Kirby*, *Mr. W. L. Terry*, and *Mr. Lewis* were on the brief, for defendant in error:

act of 1905 was passed in the exercise of the reserved of the State to alter, amend or repeal the laws affecting tions. The appellant by entering the State assented to servation, and by remaining in the State after the act fect assented to be bound by the terms thereof. Con- n of Arkansas, art. 12, § 11; *American Smelting & Refin-* v. *Colorado*, 204 U. S. 103; *C., R. I. & P. Ry.* v. *Ludwig*, d. Rep. 152.

right of the State to prescribe conditions upon the right defendant and other foreign and domestic corporations usiness in Arkansas, and to lay burdens and duties upon lows from the reservation in art. 12, § 6, of its consti- The only limitation upon this right is contained in the on that such alteration, amendment or revocation of s shall be made "in such manner, however, that no in- shall be done to corporators."

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What would be a just or unjust amendment or alteration of the laws governing corporate privileges, under this constitutional provision, is and must be a question for the state court, and is not a Federal question.

The Supreme Court of Arkansas has held that this act is valid, under the constitution of Arkansas. *Hartford Ins. Co.* v. *State*, 76 Arkansas, 303.

On the hearing of this cause below, the Supreme Court of Arkansas necessarily, in holding that §§ 8 and 9 were valid, held that their enactment was within the constitutional power of amendment reserved to the State. The highest court of a State is the tribunal of last resort upon all questions of the validity of a state statute as measured by the state constitution. *Kirtland* v. *Hotchkiss*, 100 U. S. 491; *Mo. Pac. Ry.* v. *Humes*, 115 U. S. 512, 520; *Fallbrook Irr. Dist.* v. *Bradley*, 164 U. S. 112; *French* v. *Barber Asphalt Co.*, 181 U. S. 324; *Hibben* v. *Smith*, 191 U. S. 310; *Olsen* v. *Smith*, 195 U. S. 332; *National Cotton Oil Co.* v. *Texas*, 197 U. S. 130, 131; *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28, 43; *Hunter* v. *Pittsburgh*, 207 U. S. 67.

Furthermore, the Supreme Court of Arkansas, in the case at bar, has held that these sections are valid, under the constitution of Arkansas—i. e., that they constitute such regulations as fall within the reserved power of the State to alter, amend or repeal the laws governing corporations. Upon this proposition, likewise, the decision of the highest court of the State is conclusive. *Sinking Fund Cases*, 99 U. S. 700; *Miller* v. *State*, 15 Wall. 498; *Holyoke Co.* v. *Lyman*, 15 Wall. 519; *Tomlinson* v. *Jessup*, 15 Wall. 459; *Railway Co.* v. *Maine*, 96 U. S. 510; *Shields* v. *Ohio*, 95 U. S. 324; *Woodson* v. *State*, 69 Arkansas, 521; *Railway* v. *Leep*, 54 Arkansas, 101.

A foreign corporation which comes into a State does so under an implied agreement to all the powers of the State reserved by its constitution. *State* v. *Standard Oil Co. of Indiana*, 91 S. W. Rep. 1062; *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28; *Bank of Augusta* v. *Earl*, 13 Pet. 519; *Hooper* v. *California*, 155 U. S. 648.

The act in question does not punish for acts committed beyond the jurisdiction of the State of Arkansas. The doing of business in Arkansas under given circumstances, and not the formation of the combination, is the gist of the prohibited action. *Hartford Ins. Co.* v. *State*, 76 Arkansas, 303; *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28; *Armour Packing Co.* v. *Lacy*, 200 U. S. 226.

Section 8 of the act, referring to the production of witnesses, books, papers and documents to be used as evidence, etc., is not invalid as contended. *Hammond Packing Co.* v. *State*, 81 Arkansas, 540, 541; *Consolidated Rendering Co.* v. *Vermont*, 207 U. S. 541; *Hale* v. *Henkel*, 201 U. S. 43; *State* v. *Standard Oil Co.*, 91 S. W. Rep. 1162; *National Cotton Oil Co.* v. *Texas*, 197 U. S. 133.

Section 9 of the act prescribes a procedure which meets all the requirements of due process of law, and under the facts as shown in the record, plaintiff in error has not been deprived of its property without due process of law. *Holden* v. *Hardy*, 169 U. S. 366; *Brown* v. *New Jersey*, 175 U. S. 178; *Iowa* v. *Iowa Cent. Ry. Co.*, 160 U. S. 389; *L. & N. Ry. Co.* v. *Schmidt*, 177 U. S. 230; *Wilson* v. *North Carolina*, 169 U. S. 586; *Hovey* v. *Elliott*, 167 U. S. 409, distinguished.

The essentials of due process of law as required by the Fourteenth Amendment are notice and opportunity to defend.

A party has no constitutional right to any particular form of procedure or to have applied to a case the rules of procedure which are derived from the common law.

The States, subject only to the qualification that they can not wholly deny a defendant some sort of terms, have the free and uncontrolled right to prescribe new forms of procedure and impose terms and conditions upon parties in their courts.

There is no fixed standard by which the sufficiency of the notice or opportunity to be heard shall be measured; and that the States may constitutionally abolish the ordinary or common law rules governing the hearing of cases and substitute

other procedures, so long as they give some sort of notice and opportunity to be heard.

Arising out of the distinction between the powers of the States and of the Federal Government, there is a distinction between the due process of law under the Fourteenth and Fifth Amendments, at least to the extent that the States may authorize procedures in their own courts, even unknown to the common law.

The contemporaneous construction of the due process phrase of the Fifth Amendment, placed upon it by the Congress which proposed it, by the passage of the act of 1789, demonstrates that a default judgment may be authorized by statute for refusal to produce evidence, without a denial of due process.

The legislation and decisions of the several States, authorizing such default judgments, demonstrate that the same have never been regarded as denying the due process of law.

MR. JUSTICE WHITE delivered the opinion of the court.

The Hammond Packing Company, an Illinois corporation—hereafter called the Hammond Company—seeks to reverse a judgment for ten thousand dollars as penalties for alleged violations of a state law referred to as the Anti-Trust Act of 1905.

The Hammond Company challenged the authority which the act purported to exert and the forms of procedure which the statute authorized and which were employed to enforce its requirements, because of their alleged repugnancy to the Constitution of the United States, in particulars which were enumerated. The Supreme Court of Arkansas held that the acts which the Hammond Company was charged with having committed were within the prohibitions of the law of 1905, and that the statute was in no respect repugnant to the Constitution of the United States. These conclusions were sustained by considering prior cognate legislation, and a construction given thereto, as well as by an analysis of the act of 1905, elucidated by a prior decision made concerning the same. Before recurring particularly to the procedure and judgment in this case we advert

to these subjects, as they are essential to a comprehension of the matters here arising for decision.

The constitution of Arkansas of 1874 (§ 11, art. 12) authorized foreign corporations to do business in the State, subject to the same regulations and with the same rights as those enjoyed by domestic corporations. Carrying these provisions into effect, the legislature (Kirby's Digest Laws, Ark., §§ 824 to 827) authorized permits to be issued to foreign corporations, subjecting them to like control and entitling them to the same privileges as domestic corporations on payment of the same fees as were exacted from a domestic corporation and on compliance with other statutory requirements. In § 6, art. 12, of the same constitution there was contained a reservation of the power of the legislature to repeal, alter or amend charters of incorporation, subject, however, to the limitation that thereby "no injustice shall be done to the corporators."

The Hammond Company obtained a permit and engaged in business within the State of Arkansas.

In 1899 what was known as the Rector Act was enacted for the punishment of pools, trusts and conspiracies to control prices, etc. Under this law an action was commenced to recover penalties against the Lancashire Fire Insurance Company, a foreign corporation doing business under a permit. The case was in 1899 decided by the Supreme Court of Arkansas against the State. 66 Arkansas, 466. The court held that "it [the statute] did not intend to prohibit or punish acts done or agreements made in foreign countries by corporations doing business here, when such acts or agreements have reference only to persons or property or prices in such foreign countries."

In January, 1905, the Rector Act was repealed and the statute now in question was enacted. The first section of the new law, which is in the margin,[1] reënacted the first section of the old act, with certain additions, which are in italics. Various sec-

[1] SEC. 1. Any corporation organized under the laws of this or any other State, or country, and transacting or conducting any kind of business in this State, or any partnership or individual, or other association

tions were added in the new law, of which only §§ 8 and 9 are particularly relevant to this controversy. As we shall hereafter have occasion to specially consider these sections, they are presently put out of view.

The Hartford Fire Insurance Company—a Connecticut corporation—was proceeded against for alleged violations of the act of 1905. The company defended on the ground that it was not a member of or a party to any pool, etc., made in Arkansas, and that it was not a member of any pool, etc., which in any manner affected the premium for insuring property within that State.

In disposing of the case the Supreme Court of Arkansas (76 Arkansas, 303) considered two questions: First, the proper construction of the act; and second, its constitutionality as construed. The first question was thus stated:

"1. Does the act prohibit, under the penalty named therein, a foreign insurance corporation from doing business in Arkan-

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or persons whatsoever, who *are now, or* shall *hereafter* create, enter into, become a member of, or a party to, any pool, trust, agreement, combination, confederation or understanding, *whether the same is made in this State or elsewhere,* with any other corporation, partnership, individual, or any other person or association of persons, to regulate or fix *either in this State or elsewhere* the price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning or tornado, or to maintain said price when so regulated or fixed, *or who are now,* or shall *hereafter* enter into, become a member of, or a party to any pool, agreement, contract, combination, association or confederation, *whether made in this State or elsewhere,* to fix or limit *in this State or elsewhere,* the amount or quantity of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning, storm, cyclone, tornado or any other kind of policy issued by any corporation, partnership, individual or association of persons aforesaid, shall be deemed and adjudged guilty of a conspiracy to defraud and be subject to the penalties as provided by this act.

sas while such corporation is a member of a pool, trust or combination to fix insurance rates anywhere, although such pool, trust or combination is not created or maintained in Arkansas, and does not affect or fix, or attempt to do so, rates of insurance in Arkansas. To state the proposition by illustration: Assume that the appellant is a member of a trust—called a rating bureau—created and maintained in New York city, to fix and maintain insurance rates in New York city and St. Petersburg, but which does not fix or affect rates in Arkansas, is it guilty of a violation of the act if it transacts an insurance business in Arkansas upon complying with all the statutes of the State, except the one at bar?"

In solving this question the court deemed that the correct meaning of the statute was to be ascertained by its text as illustrated by the history of the times indicating the motives which led to the adoption of the act. On this subject it was pointed out that after the decision in the *Lancashire case* public agitation concerning the effect of that decision had arisen and had occasioned an introduction in the legislature at different times of a proposed bill, known as the King bill, intended to counteract the effect of the decision in the *Lancashire case*, but which bill had failed of passage. The court said:

"In 1904 the dominant political party in this State, through its party platform, demanded of the next general assembly the passage of the King bill, and of the purpose of said bill said: 'Whereby all foreign corporations shall be prevented from doing business in this State, if they are members of any trust, pool, combination, or conspiracy against trade, whether such trust, pool, combination, or conspiracy affects or is intended to affect prices or rates in Arkansas or not.' The general assembly elected in 1904, composed almost entirely of members of the political party whose platform is quoted, with remarkable unanimity and rapidity passed the King bill, which had been rejected by the two preceding general assemblies, and in less than a fortnight of its organization it was approved, and it is the statute now at bar."

It was decided (Wood and Battle, JJ., dissenting) "that the general assembly intended by this act to subject to the penalty of it any foreign corporation doing business in this State while a member of a trust formed to fix prices anywhere."

The act as thus interpreted was sustained upon the theory that "the State has dictated these terms upon which foreign insurance companies can do business in this State," and the State "possesses the right to declare that foreign insurance corporations cannot do business in this State while belonging to a pool, trust, combination, conspiracy, or confederation to fix or affect insurance rates anywhere."

Shortly after the decision in the *Hartford case* this action was commenced by the State against the Hammond Company for a forfeiture of its permit to do business in Arkansas and for money penalties. As finally amended the complaint consisted of four paragraphs or counts. As, however, during the progress of the cause counsel stipulated that if any relief was awarded against the Hammond Company it should be confined to the matters charged in the first paragraph of the complaint and be limited to a money recovery not exceeding ten thousand dollars, and effect was given to the stipulation in the final action of the court, we put all but the first paragraph out of view.

In the first paragraph the existence of the Hammond Company and its carrying on the business of dealing in live stock and the products thereof in Arkansas at a date named was averred. It was then charged that on the date mentioned, and other stated days, the company, in violation of the act of 1905, was a member or party to a pool or trust, agreement, combination or understanding with corporations and persons, named and unnamed, who were engaged in the same line of business to regulate the prices of slaughtered live stock and to maintain such prices as so regulated and fixed. The paragraph concluded with the prayer for "judgment that the right and privilege of said defendant to do business in this State be declared forfeited, and that plaintiff have and recover of said defendant the sum of thirty thousand dollars, and all her costs in this suit

expended, together with all the expenses of the attorney general in prosecuting same, as provided in said act, and for all other and proper relief."

On the ground that the complaint was so vague that it was impossible to answer the same, the Hammond Company moved that the State be directed to make the complaint more specific, so as to show when the alleged pool or trust was created, in what respect it constituted a violation of the statute, and where, in the vast area in which it was alleged the business of the company was carried on, the asserted unlawful agreement was to operate. The motion was denied.

The complaint was demurred to on the ground that it did not allege the formation of any pool or trust in Arkansas or that it was to affect prices within that State, and therefore if the facts charged were within the prohibition of the statute the act was wanting in due process of law and was repugnant to the Fourteenth Amendment, because it was an attempt by the State to exercise authority beyond its jurisdiction. On the overruling of the demurrer the first paragraph was answered by a general and specific denial of each and every allegation thereof. Moreover, it was specially asserted that the permit was a contract on the faith of which large sums of money had been expended in purchasing property and in making permanent improvements thereon within the State which would be destroyed by a revocation of the permit, and that the business of the company was largely interstate commerce. Various defenses under the Constitution of the United States were specifically advanced, as follows: First, that to revoke the permit for the causes alleged would impair the obligations of the contract which had resulted from the issue of the permit; and, second, that to grant the relief prayed would violate the equal protection, due process, *ex post facto* and interstate commerce clauses of the Constitution of the United States.

A request of the Hammond Company that all depositions to be taken outside of the jurisdiction of the court be upon written interrogatories was denied.

The Attorney General, availing himself of § 8 of the act, which is in the margin,[1] moved for the appointment of a commis-

[1] SEC. 8. Whenever any proceeding shall be commenced in any court of competent jurisdiction in this State by the attorney general or prosecuting attorney against any corporation or corporations, individual or individuals, or association of individuals, or joint stock association or copartnership under the law against the formation and maintenance of pools, trusts of any kind, monopolies or confederations, combinations or organizations in restraint of trade, to dissolve the same or to restrain their formation or maintenance in this State, or to recover the penalties in this act provided, then and in such case, if the attorney general or prosecuting attorney desires to take the testimony of any officer, director, agent, or employé of any corporation, or joint stock association proceeded against, or in case of a copartnership, any of the members of said partnership, or any employé thereof, in any court in which said action may be pending; and the individual or individuals whose testimony is desired are without the jurisdiction of this State, or reside without the State of Arkansas, then in such case, the attorney general or prosecuting attorney may file in said court in term time, or with the judge thereof in vacation, a statement, in writing, setting forth the name or names of the persons or individuals whose testimony he desires to take, and the time when and the place where he desires said persons to appear; and thereupon the court or judge thereof shall make an order for the taking of said testimony of such person or persons and for the production of any books, papers and documents in his possession or under his control relating to the merits of any suit, or to any evidence therein, shall appoint a commission for that purpose, who shall be an officer authorized by law to take depositions in this State, and said commission shall issue immediately a notice, in writing, directed to the attorney or attorneys of record in said cause, or agent, or officer, or other employé, that the testimony of the person named in the application of the attorney general or the prosecuting attorney is desired, and requesting said attorney or attorneys of record, or said officer, agent or employé to whom said notice is delivered, and upon whom the same is served, to have said officer, agent, employé, representative of said copartnership, or agent thereof, whose evidence it is desired to take, together with such books, papers and documents, at the place named in the application of the attorney general, or the prosecuting attorney, and at the time fixed in said application, then and there to testify: *Provided, however*, That such application shall always allow in fixing said time the same number of days' travel to reach the designated place in Ar-

sioner to take testimony in the city of Chicago and for the production and examination before him of books and papers. The motion stated, first, that sixteen named persons resided in or near Chicago, and were either officers, agents, directors or employés of the Hammond Company; that it was the desire of the State to take their testimony on a day named, that all of said witnesses were hostile and would not make fair answers to written interrogatories, that the facts as to the business methods of the corporation "relevant to the issue in this case and within the knowledge of the said persons aforementioned are such that your relator can have no accurate knowledge of same until opportunity is given him to interrogate the aforesaid persons, who have peculiar and sole knowledge thereof; and that it is impossible for your relator to so frame written interrogatories to said persons as to elicit the facts within their knowledge relevant to the issues in this case." As to the production of books and papers, it was stated that "said persons have in their possession and under their control, and at the Chicago office of the defendant company, numerous books, papers and documents bearing upon the issues in this cause and relevant to the claim of the plaintiff herein; that the precise description and nature of these is peculiarly within the knowledge of the aforesaid persons; and that it is impossible for your relator to so frame written interrogatories and demands as to require the production of such books, papers and documents as aforesaid as are relevant to the issues in this cause." In response to this motion the Hammond Company asked that the State be required to "set out specifically what she expects to prove by each witness she desires produced, and also to set out specifically a particular

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kansas that would now be allowed by law in case of taking depositions: *Provided, also,* In addition to the above-named time, six days shall be allowed for the attorney or attorneys of record, or the agent, officer or employé on whom notice is served to notify the person or persons whose testimony is to be taken. Service of said notice as returned in writing may be made by any one authorized by law to serve a subpœna.

description of any books she desires produced by any of said witnesses, together with the name of the witness who is to produce them, and that she be required to specifically state wherein any of said books so named are material to the issues in the case." The Attorney General thereupon filed an affidavit, reciting that he was "at this time unable to designate and particularly point out the books, papers and documents which will be required in evidence on the execution of the commission . . . that the contents and particular description of said books, papers and documents are matters peculiarly within the knowledge of the defendant, and the witnesses whose examination is prayed at said time and place, and that it is impossible and impracticable for me at this time to designate particularly the matters as to which each witness whose testimony is sought to be taken . . . can testify, or to frame interrogatories to such witnesses or state at this time the substance of his evidence, for the reason that the matters as to which it is sought to examine said witnesses are matters touching the conduct and business of the defendant company and as to which the defendant and said witnesses have peculiar and sole knowledge." The motion to make the request more specific was overruled and an order was entered authorizing the designated commissioner to take the testimony of the witnesses named and to have produced before him by the Hammond Company "any books, papers and documents in the possession or under the control of either of said persons relating to the merits of said cause or to any defense therein," accompanied with the proviso "that at such examination the witnesses and books aforesaid shall not be required to be produced at any one time in such numbers as to interfere with the operation of the defendant's business." The order contained specific directions commanding the Hammond Company, through its officers or agents or attorney, to have the witnesses named present for examination and to produce the books referred to in the order. To the entry of this order exception was duly reserved.

The commissioner notified the Hammond Company to produce the witnesses named and the books and papers referred to at his office in Chicago on a designated day. The Hammond Company, through its attorneys, declined to comply and stated, in writing, that it could not concede the power of the court to make the order which it had made, and that "on the contrary it was of the opinion that the request calls upon it [the Hammond Company] to surrender rights in which it is protected by the Constitution of the United States and of the State of Arkansas that are too valuable to be surrendered."

Return, stating the refusal to produce, having been made to the court, the Attorney General, under § 9 of the act of 1905, which is in the margin,[1] moved to strike out all "answers, de-

[1] SEC. 9. Whenever the persons mentioned in the preceding sections shall be notified, as above provided, to request any officer, agent, director or employé to attend before any court, or before any person authorized to take the testimony in said proceedings, and the person or persons whose testimony is requested, as above provided, shall fail to appear and testify and produce any books, papers and documents, they may be ordered to produce by the court, or the other officer authorized to take such evidence, then it will be the duty of the court, upon motion of the attorney general or prosecuting attorney, to strike out the answer, motion, reply, demurrer or other pleading then or thereafter filed in said action or proceeding by the said corporation, joint stock association or copartnership, whose officer, agent, director or employé has neglected or failed to attend and testify and produce all books, papers and documents he or they shall have been ordered to produce in said action by the court or person authorized to take said testimony, and said court shall proceed to render judgment by default against said corporation, joint stock association or copartnership. *And it is further provided*, That in case any officer, agent, employé, director or representative of any corporation, joint stock association or copartnership in such proceeding, as hereinbefore mentioned, who shall reside or be found within this State, shall be subpœnaed to appear and testify or to produce books, papers and documents, and shall fail, neglect or refuse to do so, then the answer, motion, demurrer or other pleading then and thereafter filed by said corporation, joint stock association or copartnership in any such proceeding, shall, on motion of the attorney general or prosecuting attorney, be stricken out and judgment in said cause rendered against said corporation, joint stock association or copartnership.

murrers, motions, replies or other pleadings filed by the defendant in this cause and render in favor of the State of Arkansas a default judgment in this case for ten thousand dollars, as penalties for the violations of the act of the general assembly of the State of Arkansas, approved January 23, 1905, on the days and dates set forth in the complaint herein, and for all costs in this cause incurred." The Hammond Company, in response to the motion, set up the defense that to deny it the right to defend would be a condemnation without a hearing and a consequent denial of due process of law in conflict with the Fourteenth Amendment. The motion of the Attorney General was granted, and a judgment for penalties amounting to ten thousand dollars was, as before stated, entered, which on appeal was affirmed by the Supreme Court. 81 Arkansas, 519.

On the general question of the meaning of the act of 1905 the court adhered to the interpretation given the act in *Hartford Insurance Co.* v. *State*, *supra*, and also to the ruling in that case made concerning its validity, both as regards the constitution of the State and that of the United States. After holding that the proceeding was not criminal but was "purely a statutory action to recover the penalties of the statute for doing business in the State contrary to its terms," the court came to consider the objections urged to the validity of §§ 8 and 9. Passing on the contention that the order made under § 8 for the production of books, papers and witnesses was so unlimited as to be repugnant to the state and Federal constitutions, the subject was considered from a twofold aspect; first, the order for the production of the books and papers; and, second, that for the production of witnesses. As to the first, while conceding for the sake of argument that it might be that an order on a corporation, whether domestic or foreign, for the production of books and papers could be framed in so unlimited a manner as to amount to a violation of a provision against unreasonable searches and seizures found in the state constitution, it was held that that question was irrelevant and not necessary to be

ecided. This conclusion was reached because it was declared at, as the order called also for the production of witnesses, there was a failure to comply with that portion of the order e judgment below was properly rendered. Considering the lidity of the order for the production of the witnesses and e contention that it was so arbitrary and unreasonable as to nount to a denial of due process of law, because it called upon e corporation to produce a number of witnesses, simply on the averment that they had some contract or fiduciary lation with the company, without at all considering its wer to produce them or affording to the corporation any mpulsory process for requiring the witnesses to attend if ey were unwilling to do so, the court, speaking of the statute, id:

"If these provisions mean that the corporation must be a liceman, and bring into court on demand its president, book-eper or doorkeeper *vi et armis*, certainly it would be an un-asonable imposition. An analysis of the provisions, however, ll not justify such construction. These sections evidently ean this and nothing more: that the corporation shall on de-and request any given officer, agent or employé to be present the time named for examination as a witness (and in case of oduction of books and papers that the given officer or agent oduce the given papers), and on a failure to comply with ese requirements that it be defaulted. Of course this nec-sarily contemplates an honest effort to produce the testimony lled for. When that is made, then the statute is complied th; when it is not, as in this case, where the defendant cor-ration refused to obey any part of the order, then the statute not complied with, and that brings up the gravest question the case."

In holding that the provisions of § 9, authorizing the strik-g out of the pleadings of the defendant and rendering judg-ent against him, as by default, were valid, the court held that e conferring of such a power by the statute, and its exercise manifested in the case before it, was not repugnant to either

the constitution of the State or that of the United States. In reaching this conclusion the court, in substance, held that the ruling of this court in *Hovey* v. *Elliott*, 167 U. S. 416, must be limited to a case where a court, in virtue alone of its asserted inherent power to punish for contempt, strikes an answer from the files and renders judgment as by default, and therefore did not embrace a case where such authority was exercised by a court in consequence of an express delegation by law of the power so to do. This limitation on the ruling in *Hovey* v. *Elliott* was deemed to be justified by a reference to and an analysis of the statutory law of the United States, which the court deemed conferred such power upon the courts of the United States, as well as many state statutes, including those of Arkansas and various state decisions, all of which it was deemed established the existence of the legislative power to authorize a court to punish a defendant by striking his answer from the files, and, over his objection, rendering a judgment against him.

Condensing, though not changing, the substance of the assignments of error, in the light flowing from the review which we have made, we come to dispose of such assignments, not, however, following the precise order in which they are stated in the brief of counsel.

1*st. Section* 1 *of the law of* 1905 *legislates concerning acts done beyond the limits of the State, and therefore takes property without due process of law, and deprives of the equal protection of the laws, contrary to the Fourteenth Amendment.*

But the premise upon which the proposition is based is imaginary, since it assumes that the statute does that which it has been conclusively determined by the court below it does not do. The interpretation which the court below gave to the statute was that it did not purport to forbid or affix penalties to acts done beyond the State, but that it simply forbade a corporation from continuing to do business within the State after it had done, either within or outside of the State, the enumerated acts. If the premise of the asserted proposition

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be that even although the statute addressed itself exclusively to the doing of business within the State under the circumstances stated, it nevertheless exerted an extraterritorial power, because it restrained the continuance of the business within the State by a corporation which had done the designated acts outside of the State, we think the proposition without merit. As the State possessed the plenary power to exclude a foreign corporation from doing business within its borders, it follows that if the State exerted such unquestioned power from a consideration of acts done in another jurisdiction, the motive for the exertion of the lawful power did not operate to destroy the right to call the power into play. This being true, it follows that, as the power of the State to prevent a foreign corporation from continuing to do business is but the correlative of its authority to prevent such corporation from coming into the State, unless by the act of admission some contract right in favor of the corporation arose, which we shall hereafter consider, it follows that the prohibition against continuing to do business in the State because of acts done beyond the State was none the less a valid exertion of power as to a subject within the jurisdiction of the State.

In both the refusal to permit the coming into the State and the exclusion therefrom of a corporation previously admitted under the circumstances stated, while it may be said that the acts done out of the State and their anticipated reflex result may have been the originating cause for the exertion of the lawful authority to refuse permission to come into the State, or to revoke such permission previously given, that fact is immaterial in a judicial inquiry as to the right either to refuse to give or to revoke a permit to do business within the State, since the power, and not the motive, is the test to be resorted to for the purpose of determining the constitutionality of the legislative action.

Although it be conceded that the provisions of the statute cannot consistently with constitutional limitations be applied to individuals, such concession would not cause the act to amount to a denial of the equal protection of the laws. The

difference between the extent of the power which the State may exert over the doing of business within the State by an individual and that which it can exercise as to corporations furnishes a distinction authorizing a classification between the two. It is apparent that the court below, both in the *Hartford case* and in this, by a construction which is here binding, treated the statute, in so far as its prohibitions were addressed to individuals, as separable from its requirements as to corporations, and, therefore, even though there was a want of constitutional power to include individuals within the prohibitions of the act, that fact does not affect the validity of the law as to corporations.

2d. *The act as construed by the court below is repugnant to* § 10 *of Art. I of the Constitution of the United States, since the necessary effect of that construction is to impair the obligation of the contract which was created in virtue of the constitution and laws of Arkansas by the permit which was issued.*

By the constitution and laws of the State of Arkansas it is said foreign corporations, when lawfully admitted to do business in the State, were entitled to rights equal to those enjoyed by domestic corporations. Possessing this right of equality, it is argued that a permit to do business could not be revoked for causes not made applicable to domestic corporations without impairing the obligations of the contract which arose from the permit. *American Smelting Company* v. *Colorado*, 204 U. S. 103. With this proposition in hand—which is not denied by the State—the argument insists that as the statute does not forbid a domestic corporation from continuing to do business under a charter granted by the State, because it has done the acts specified in the statute, therefore a discrimination results in favor of domestic corporations. But, again, the contention rests upon an erroneous assumption as to the operation of the statute. We say this because on the face of the statute its prohibitions are made applicable to domestic and foreign corporations. The insistence that the result of the decision in this case, as well as of that made in the *Hartford case*, is to give the stat-

ute a controlling construction, operating to exempt domestic corporations from its provisions, is unfounded. True, that both in the *Hartford case*, as in this, the court below, in testing the question of power considered solely the scope of the legislative authority over foreign corporations. But in so doing the court simply confined itself to the question before it, as in both cases the defendants were foreign corporations doing business under permit. Nothing in the general reasoning advanced by the court as to the power of the State over foreign corporations begets the thought that it was intended to decide that the express words of the statute concerning domestic corporations were meaningless or beyond the authority of the State to enact. While it is true that the reference made in the opinion in the *Hartford case* to the platform of the dominant political party which it was assumed shed light upon the true meaning of the act indicates that the impelling motive in adopting the act of 1905 was to reach foreign corporations, this does not justify the inference that the act was not intended to govern domestic corporations doing like acts, but, on the contrary, tends to establish the existence in the legislative mind of the purpose not to discriminate in favor of domestic corporations, since the latter were expressly embraced in the statute.

The contention that to apply the law to domestic corporations would as to such corporations cause it to be repugnant to the contract clause of the Constitution, is without merit. The chartered right to do a particular business did not operate to deprive the State of its lawful police authority, and therefore the franchise to do the business was inherently qualified by the duty to execute the charter powers conformably to such reasonable police regulations as might thereafter be adopted in the interest of the public welfare. Besides, it is not disputed that the State under its constitution had a reserve power to repeal, alter and amend charters by it granted, and therefore, even if the impossible assumption was indulged that the grant of the power to do business implied in the absence of such reservation the right to carry on the business in violation of a lawfully

regulating statute, the existence of the reserve power leaves no semblance of ground for the proposition. The claim of an irrepealable contract cannot be predicated upon a contract which is repealable. *Citizens' Savings Bank* v. *Owensboro*, 173 U. S. 636, 644. And no support for the contrary view arises, because the constitution of Arkansas exacted that the authority to repeal, alter and amend should be exercised "in such manner, however, that no injustice be done to the corporators." The determination whether the power to repeal, alter or amend was exerted in such a manner as to be unjust to incorporators was within the province of the state court to finally decide, unless that power was exerted in such an arbitrary manner as, irrespective of the contract clause, to deprive of some other and fundamental right which was within the protection of the Constitution of the United States.

3d. *The action of the trial court in making the order to produce, and on failure to comply therewith, striking the pleadings of the Hammond Company from the files and rendering a judgment as by default, was void, because repugnant to the equal protection and due process clauses of the Fourteenth Amendment.*

As the conduct of the trial court on the subjects with which this proposition is concerned conformed to the authority conferred by §§ 8 and 9 of the statute, it follows that the proposition is that those sections are repugnant to the Fourteenth Amendment. The grounds which are made the basis of this proposition are numerous and are stated in various forms not separated one from the other. We shall disentangle them and treat them separately, and thus consider and dispose of them all.

It is said, conceding that the power which § 8 confers could be exerted under just limitations, yet the order made, which was authorized by the statute, was so unlimited, so arbitrary and unjust as to cause it to be wanting in due process. This rests upon the assumption that the order to produce the books and papers of the company and the witnesses, was imperative, and did not consider the ability of the company to comply, furnished no compulsory process to compel obedience in case a

named witness refused to appear at the request of the company, and therefore left the company helpless and subject to pains and penalties for a failure to do that which it may not have been in its power to do. But again the proposition rests upon the assumption that the statute and the order which conformed to it did that which the court below decided it did not do. Conceding, for the sake of the argument, that the broad provisions of § 8 and the general language of the order to produce, might on their face be amenable to the criticism which the proposition involves, the statement we have previously made demonstrates that the court below, by a construction which is binding here, expressly decided that neither the statute nor the order were subject to the interpretation which the argument attributes to them. Indeed, the court impliedly conceded that if the statute and the order meant that which the argument contends they did mean, both the statute and the order would have been void. But in intimating to that effect it was expressly held that all the statute required was a *bona fide* effort to comply with an order made pursuant to its provisions, and therefore any reasonable showing of an inability to comply would have satisfied the requirements both of the statute and the order. As the Hammond Company absolutely declined to obey the order and stood upon what it deemed to be its lawful rights and privileges, even if that course of conduct was taken because of a contrary conception as to the meaning of the statute, it is not within our province to afford relief because of an error of judgment in this respect. That is to say, we may not hold that the statute and order were arbitrary and unjust in the particulars asserted when it is conclusively determined that they do not have that effect.

It is insisted that the order to produce was so general and indefinite as to amount to an unreasonable search and seizure, and consequently was wanting in due process of law. But conceding, for the sake of argument only and not so deciding, that the due process clause of the Fourteenth Amendment embraces in its generic terms a prohibition against unreasonable searches

and seizures, a question hitherto reserved, under circumstances analogous to those here present, in *Consolidated Rendering Co.* v. *Vermont*, 207 U. S. 541, we think the ruling made in that case establishes the unsoundness of the contention. We say this because it was in that case determined in view of the visitorial powers of a State over corporations doing business within its borders and the right of the State to know whether the business of a corporation was being carried on in a lawful manner, that it was competent for the State to compel the production of the books and papers of the corporation in an investigation to ascertain whether the laws of the State had been complied with. And of course such power embraces the authority to require the giving of testimony by the officers, agents and other employés of the corporation for like and analogous purposes. It is true that the books and papers to which the order made in the cited case related were those of a foreign corporation doing business in Vermont, and which had been kept in the State, but had been taken therefrom. But we see no reason to hold that this case is not controlled by the principle applied in the *Consolidated Rendering Co. case*, because the books of the Hammond Company, which were called for, may not have been at any time kept within the State of Arkansas.

Nor do we think there is merit in the contention that the order to produce was wanting in due process because it was made in a pending suit and sought to elicit proof not only as to the liability of the company, but also the proof in the possession of the company relevant to its defense to the claim which the State asserted. As these subjects were within the scope of the visitorial power of the State and concerning which it had the right to be fully informed, the mere incident or purpose for which the lawful power was exerted affords no ground to deny its existence. In *Consolidated Rendering Company* v. *Vermont*, the books and papers were required for an investigation before a grand jury concerning supposed misconduct of the corporation. The power to compel the production to ascertain whether wrong had been done, in the nature of things, as the greater in-

cludes the less, is decisive as to the right to exact the production for the purpose of proof in a pending cause. See *Hale* v. *Henkel*, 201 U. S. 43. If, as was in that case decided, the power of visitation could be exercised, even although it might lead to the production of incriminating evidence merely because the order to produce in this case called for evidence in the possession of the corporation relevant to its defense did not affect the validity of the order.

The contention that because § 8 applies only to books and papers outside of the State, therefore it denies the equal protection of the laws is not open, since it has been conclusively settled that, without denying the equal protection of the laws, relations may be based upon the fact that persons or property dealt with are not within the territorial jurisdiction of the regulating authority. *Central Loan & Trust Co.* v. *Campbell*, 173 U. S. 84. Even if, as contended, the remedy given by the act for the production of books and papers and the examination of witnesses is confined to corporations and joint stock associations, and does not extend to individuals, that fact also furnishes no ground for the proposition that a denial of the equal protection of the laws thereby resulted. The wider scope of the power which the State possesses over corporations and joint stock associations in and of itself affords a ground for the classification adopted.

Lastly, with much earnestness and elaboration, it is urged that the action of the court, authorized by § 9, in striking the answer from the files and rendering a judgment as by default, is conclusively demonstrated to have been a denial of due process of law by the ruling in *Hovey* v. *Elliott*, 167 U. S. 409, and the previous cases in this court which were there cited and applied. The ruling in *Hovey* v. *Elliott* was that to punish for contempt by striking an answer from the files and condemning, as by default, was a denial of due process of law, and therefore repugnant to the Fourteenth Amendment. There the power to strike out and punish was exerted, by the court, in virtue of what it assumed to be its inherent authority, and the occasion

which caused the exercise of the assumed authority was the refusal of the defendant to comply with an order to pay into the registry of the court a sum of money which, it was held, had been illegally withdrawn, and the right to which was at issue in the suit. Merely because the power to strike out an answer and enter a default, which was exerted by the court below in this case, was authorized by the ninth section of the statute furnishes no ground for taking this case out of the ruling in *Hovey* v. *Elliott*, if otherwise controlling. The fundamental guarantee of due process is absolute and not merely relative. The inherent want of power in a court to do what was done in *Hovey* v. *Elliott* was in that case deduced from no especial infirmity of the judicial power to reach the result, but upon the broad conception that such power could not be called into play by any department of the Government without transgressing the constitutional safeguard as to due process, at all times dominant and controlling where the Constitution is applicable. Indeed in *Hovey* v. *Elliott* the impotency of the legislative department to endow the judicial with the capacity to disregard the Constitution was emphasized. But while this is true the question yet remains, Is the doctrine of *Hovey* v. *Elliott* here applicable? To determine this question we must take into view the authority below, exerted not from a merely formal point of view, but in its most fundamental aspect. That is to say, we must trace the power to its true source, and if from doing so it results that the authority exerted flows from a reservoir of unquestioned power it must follow that the action below was not unlawful, albeit in some narrower aspect that action might be considered as unlawful. The essential basis for the exercise of power and not a mere incidental result arising from its exertion is the criterion by which its validity is to be measured. *Hovey* v. *Elliott* involved a denial of all right to defend as a mere punishment. This case presents a failure by the defendant to produce what we must assume was material evidence in its possession and a resulting striking out of an answer and a default. The proceeding here taken may therefore find its sanction in the un-

doubted right of the lawmaking power to create a presumption of fact as to the bad faith and untruth of an answer begotten from the suppression or failure to produce the proof ordered, when such proof concerned the rightful decision of the cause. In a sense, of course, the striking out of the answer and default was a punishment, but it was only remotely so, as the generating source of the power was the right to create a presumption flowing from the failure to produce. The difference between mere punishment, as illustrated in *Hovey* v. *Elliott*, and the power exerted in this, is as follows: In the former due process of law was denied by the refusal to hear. In this the preservation of due process was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense. The want of power in the one case and its existence in the other are essential to due process, to preserve in the one and to apply and enforce in the other. In its ultimate conception therefore the power exerted below was like the authority to default or to take a bill for confessed because of a failure to answer, based upon a presumption that the material facts alleged or pleaded were admitted by not answering, and might well also be illustrated by reference to many other presumptions attached by the law to the failure of a party to a cause to specially set up or assert his supposed rights in the mode prescribed by law.

As pointed out by the court below, the law of the United States as well as the laws of many of the States, afford examples of striking out pleadings and adjudging by default for a failure to produce material evidence, the production of which has been lawfully called for. Rev. Stat. U. S. § 724, which was drawn from § 15 of the judiciary act of 1789, after conferring upon courts of law of the United States the authority to require parties to produce books and writings in their possession or under their control which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceed-

ings in chancery, expressly empowers such courts, if a plaintiff fails to comply with the order to render a judgment of non-suit, and if a defendant fails to comply "the court may, on motion, give judgment against him by default." From the time of this enactment, practically coeval with the Constitution, although controversies have arisen as to its interpretation, no contention, so far as we can discover, has ever been raised questioning the power given to render a judgment by default under the circumstances provided for in the statute. Its validity was taken for granted by the court, speaking through Mr. Chief Justice Taney, in *Thompson* v. *Selden*, 20 How. 194, and this was also assumed by the court, speaking through Mr. Justice Bradley, in *Boyd* v. *United States*, 116 U. S. 616, where the effect of the constitutional guarantees embodied in the Fourth and Fifth Amendments were elaborately and lucidly expounded. It is unnecessary to cite the many cases in the lower Federal courts which manifest the same result, as they will be found collected in Gould & Tucker's Notes on the Revised Statutes, under § 724, and in the notes to the same section, contained in volume 3, Federal Statutes Annotated.

And, beyond peradventure, the general course of legislation and judicial decision in the several States indicates that it has always been assumed that the power existed to compel the giving of testimony or the production of books and papers by proper regulations prescribed by the legislative authority, and for a failure to give or produce such evidence, the law might authorize a presumption in a proper case against the party refusing, justifying the rendering of a judgment by default, as if no answer had been filed. While it may be true that in some of the state statutes passed on the subject, and in decisions applying them, some confusion may appear to exist, resulting from confounding the extent of the authority to punish as for a contempt and the right to engender a presumption relative to proof arising from a failure to give or produce evidence, it is accurate to say that when viewed comprehensively the statutes and decisions in effect recognize the difference between the two, and

therefore may be substantially considered as but an exertion by the States of a like power to that which was conferred upon the courts of the United States by the original judiciary act and by Revised Statutes, § 724.

Without referring in detail to the various statutes, which will be found collected as of the year 1896, in vol. 6, Ency. Law and Practice, note 3, pp. 812 *et seq.*, we content ourselves with saying that the laws of Indiana, Iowa, Mississippi, Massachusetts, Missouri, New Hampshire, Texas and Washington aptly portray the subject. As illustrative, we refer specially to the statute of Missouri, which directs that when a party refuses to produce evidence or fails to attend to testify on a proper order, besides being punished as for a contempt, the court may strike out the answer filed on behalf of the defendant, etc. This distinction is also marked in the Indiana and Washington statutes. Although the statute of Mississippi, which authorizes, in the event of a failure to obey a proper order as to the production of evidence, the striking of an answer from the files and the entry of judgment by default does not in terms refer the authority thus given to the legislative power to engender a presumption, the true source of the power was clearly pointed out in the concurring opinion of Whitfield, J. (now Chief Justice of the Supreme Court of Mississippi), in *Illinois Central R. Co.* v. *Sanford*, 75 Mississippi, 862, and the distinction was made manifest between the power to create a presumption of fact and the want of authority as a mere punishment for contempt to deny a hearing, as ruled in *Hovey* v. *Elliott*. And the difference between the two is also elucidated in the opinion of the Supreme Court of the State of Washington in *Lawson* v. *Black Diamond Mining Co.*, 44 Washington, 26, which interpreted and enforced a statute of the State of Washington embraced in § 6013 and immediately antecedent sections of Ballinger's Annotated Code and Statutes.

As the power to strike an answer out and enter a default, conferred by § 9 of the act of 1905, which is before us, is clearly referable to the undoubted right of the lawmaking authority

to create a presumption in respect to the want of foundation of an asserted defense against a defendant who suppresses or fails to produce evidence when legally called upon to give or produce, our opinion is that the contention that the section was repugnant to the Constitution of the United States is without foundation. In so deciding our conclusion is of course based upon the legality and sufficiency of the order to produce made under § 8 of the act, and as our decision on that subject rests upon the extent of the visitorial power which the State had the right to exercise over a corporation subject to its control, our ruling as to the legality of the call under § 8 is confined to the case before us.

Affirmed.

THE CHIEF JUSTICE and MR. JUSTICE PECKHAM dissent.